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No. 308

# Supreme Court of the United States

OCTOBER TERM, 1968

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JAMES J. RETTER, *Petitioner*,

*v.*

THE UNITED STATES, *Respondent*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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# Supreme Court of the United States

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No.

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JAMES J. RITTER, *Petitioner,*

*v.*

THE UNITED STATES, *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in this case on April 19, 1968.

### OPINIONS BELOW

The Court of Claims adopted the opinion, findings of fact, and conclusion of law of its trial commissioner, all of which appear as Appendix A (p. 1a, *infra*). The opinion is reported at 393 F.2d 823.

## JURISDICTION

The opinion of the Court of Claims, which constitutes its judgment in this case, was filed on April 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) (1964).

## QUESTION PRESENTED

Whether reimbursements to an employee by his employer for moving expenses incurred by the employee and for a loss suffered in the sale of his house, both occasioned solely by a required transfer of his place of employment for the convenience of his employer, are taxable to the employee as ordinary income.

## STATUTES INVOLVED

Sections 61(a), 62(1), 62(2), 162(a), 217, 262, 1001(a) and 1001(b) of the Internal Revenue Code of 1954, which are reproduced in Appendix B (p. 1b, *infra*).

## STATEMENT OF THE CASE

The facts, set forth in greater detail in the report of the trial commissioner (p. 2a, *infra*), are basically undisputed. They squarely pose the central legal issue decided below and presented here, namely, whether reimbursements that do no more than relieve an employee of expenses and loss suffered in a change of job location required by his employer are nonetheless taxable as ordinary income to the employee.

Petitioner James J. Ritter was in 1957 the Regional Controller for the Data Processing Division, Western Region, of International Business Machines Corporation (IBM), in whose employ he had been since 1952

(p. 22a, *infra*). During the summer of 1957 IBM decided to move its Western Region headquarters from San Francisco, in a suburb of which Ritter resided and owned a home, to Los Angeles. The decision was prompted solely by the requirements of IBM's business, including the presence of major customers in Southern California and enlargement of the company's Western Region to embrace Texas (p. 31a, *infra*). Ritter was among the employees IBM determined to transfer, because his position was a headquarters post and because it was company policy to provide a new office with a cadre of experienced personnel (pp. 26a, 31a, *infra*). The relocation did not involve a promotion or increase in salary for him (p. 32a, *infra*).

Ritter, although comfortably settled in his community and preferring to live near San Francisco (p. 33a, *infra*), had only two alternatives to accepting the transfer and moving his home and family to Los Angeles: he could have resigned from IBM entirely, sacrificing various accrued benefits as well as his job, or he could have taken a substantial demotion to the post of commission salesman and remained in the IBM San Francisco office with a probable sharp decline in income (pp. 32a-33a, *infra*). Thus, Ritter concluded, "his only realistic choice" was to transfer, and he did so in the fall of 1958, selling his house near San Francisco and purchasing a new home in a Los Angeles suburb (pp. 22a, 32a, *infra*).

To soften the financial impact of required relocation, IBM—like many other corporations and the federal government (see pp. 13-14, *infra*)—reimburses various expenses and losses of employees caused by company-directed transfers. IBM's reimbursement

policy applies equally to all permanently transferred employees without regard to position or salary (p. 30a, *infra*).[1] Accordingly, Ritter was reimbursed for certain out-of-pocket expenses he had incurred, each related to and caused by the move, in the amount of $6,511.86. The expense items, detailed by the trial commissioner (pp. 3a n. 1, 22a-24a, *infra*), included travel expenses of Ritter between the two cities, transportation expenses of his family and household goods, expenses of selling his San Francisco house such as brokerage fees, expenses of purchasing the Los Angeles house such as closing payments, related expenses such as the refitting of old furnishings like drapes to fit the new house, and certain maintenance costs during the period in which the old house had been vacated but not sold.

IBM also reimbursed Ritter for a $4,737.50 loss incurred on the sale of his San Francisco home (p. 24a, *infra*). This, too, was in accord with IBM's established practice in transfer cases, based upon recognition that the forced sale of a house may require offering it at an inopportune time. The amount reimbursed was the difference between the fair market value of Ritter's old house—fixed by several independent appraisers in what the trial commissioner found to be "a reasonable and objective manner"—and the lesser amount received in the forced sale (p. 30a, *infra*).

The expense items and the house loss resulted from a move dictated by IBM's transfer of Ritter entirely for its own business convenience, each was properly

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[1]IBM maintains two schedules or policies designating those expenses and losses that it will reimburse and specifying in advance the applicable procedures (pp. 22a-25a, 27a-30a, *infra*).

documented, and none was unreasonable in amount (pp. 3a, 24a, 31a, *infra*). The reimbursements, as the trial commissioner further found, did not flow from any agreement with, or intention on the part of, IBM to use the job transfer to increase Ritter's compensation (pp. 30a, 33a, *infra*). The transfer did not increase Ritter's net worth by a penny, but actually decreased it because of substantial move-related expenses that IBM did not reimburse and less favorable mortgage terms obtained by him at the new residence (pp. 33a-34a, *infra*).

Despite these circumstances the Internal Revenue Service concluded that the expense reimbursements, except those covering transportation of Ritter, his family and his household goods, were "income" to Ritter under section 61 and were not deductible as business expenses under sections 62 and 162.[2] The Service also concluded that the house loss reimbursement was ordinary income, rejecting Ritter's treatment of this payment as part of the "amount realized" on the sale of his house under section 1001. Pursuant to that section he had offset the payment against his adjusted basis on the house and paid a capital gains tax on the excess.

The Service's treatment of the reimbursements, although they did no more than alleviate the expenses and loss caused by the company-directed move, increased Ritter's taxable income almost fifty percent and raised his tax by $3,324.01 (p. 25a, *infra*). Ritter paid the additional tax and brought suit for refund in the Court of Claims, where the trial commissioner

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[2] Citation of specific sections throughout will refer to the Internal Revenue Code of 1954 unless otherwise identified.

ruled that the expense reimbursements were income, the expenses were not deductible, and the property loss payment was ordinary income and not part of the amount realized on the sale of Ritter's house. After holding the case under advisement for a full year, the Court of Claims adopted the trial commissioner's report *in toto* and without further discussion. Judge Davis, joined in part by Judge Skelton, dissented from that portion of the court's decision that concluded that the expense items were not deductible from income as business expenses.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Misconstrues the Leading Relevant Decisions of This Court, Creates a Direct Conflict With the Tax Court, and Sanctions a Blatantly Inconsistent Position Taken by the Internal Revenue Service.

In holding that the reimbursements constituted income to Ritter, the Court of Claims rested its decision upon *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), *Commissioner* v. *Smith*, 324 U.S. 177 (1945), and *Commissioner* v. *LoBue*, 351 U.S. 243 (1956). Yet precisely the opposite conclusion is impelled by examination both of *Glenshaw*, which classed as income punitive damages awarded to the taxpayer, and of *Smith* and *LoBue*, which similarly taxed stock options granted by employers to their employees.

In all three cases, the transactions brought to the taxpayers what the *Glenshaw* opinion called "undeniable accessions to wealth." 348 U.S. at 431. Here, on the contrary, the reimbursements to Ritter merely offset employer-caused expenses and loss, and the net result of relocating was a substantial financial loss for

Ritter.[3] The opinions in *Smith* and *LoBue* stressed that the stock options in question amounted to "compensation" for past or future services. Here, again in marked contrast, the reimbursements "were not taken into account in any way by the management of IBM in determining appropriate levels of compensation for employees" (p. 30a, *infra*). Not merely IBM but industry at large views such reimbursements as non-compensatory, *Wall St. J.*, Dec. 9, 1965, p. 1, and the Chairman of the Civil Service Commission, obtaining like reimbursement for federal employees, told Congress: "[T]his is not compensation, this is not additional income. This is reimbursement, and therefore, should not be taxable."[4]

The lower court has thus adopted a reading of this Court's opinions in *Glenshaw, LoBue* and *Smith* which sanctions indiscriminate inclusion of almost any pay-

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[3] It is, of course, the transaction taken as a whole that determines taxability and not the mere receipt of a payment. *E.g.*, United States v. Supplee-Biddle Hardware Co., 265 U.S. 189 (1924) (life insurance proceeds not income to corporation); Jones v. United States, 60 Ct. Cl. 552 (1925) (army officer quarters allowance not income); Rev. Rul. 59-92, 1959-1 C.B. 11 (research grant not income).

[4] Hearings Before a Subcommittee of the House Committee on Government Operations on H.R. 10607, 89th Cong., 1st Sess. 48-49 (1965). The Department of Defense has taken the same position on similar payments made to servicemen, its spokesman declaring that they are "not intended to be compensatory, but [are] made solely to insure that members of the uniformed services do not incur financial loss" through the exigencies of national defense. Letter from Assistant Defense Secretary Paul to Acting Internal Revenue Commissioner Harding, Aug. 6, 1964 (reprinted at p. 12 of Brief Amicus Curiae of Associated Industries, England v. United States, No. 603, Oct. Term, 1965, U.S. Sup. Ct.).

ment as income. Yet numerous examples of payments held not to qualify as income forbid this approach, see, *e.g.*, n. 3, *supra*, and this Court has specifically warned that whether a payment is income depends on analysis of its own salient characteristics. *Commissioner* v. *Duberstein*, 363 U.S. 278, 287-89 (1960). In abstracting the most general language from the Court's opinions, the decision below has overlooked the indicia of income stressed in those very cases—overall enhancement to the taxpayer and compensatory character of the payment. The pertinent analogy in this case is to an employer's reimbursements to his employee for office supplies, for business travel costs, or for working tools initially paid for by the employee. All are direct payments which, like those involved here, are occasioned by the employer's needs, all work no net gain for the employee, and all are viewed by neither employer nor employee as compensation; all are excludable from income, as even the Service appears to concede. See, *e.g.*, *Siegfried* v. *United States*, 55-2 U.S. Tax Cas. para. 9531 (N.D. Okla. 1955); Treas. Reg. § 1.162-17(b)(1); Rev. Rul. 67-30, 1967-1 C.B. 9.

The Court of Claims' refusal to allow deduction of the reimbursed expenses as "business expenses"—the alternative to excluding them from income—is equally flawed by its misreading of this Court's leading decision in *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). *Flowers*, concerned with the analogous problem of travel expenses, focused upon the requisite linkage between the business and the expense and demanded a "direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer." *Id.* at 470. As the only requisite

of deductibility subject to question in this case,[5] that "direct connection" is surely provided by the settled facts that Ritter was transferred for IBM's convenience and moved solely to retain his job, and that all reimbursed items "were occasioned by [Ritter's] 1958 move . . . . [T]hey would not have been incurred but for the move" (pp. 24a, 31a, *infra*). As the dissent in this case notes, the Tax Court has already held to be deductible employee moving expenses that cannot reasonably be distinguished from those at issue here (p. 19a, *infra*).

As for the house loss reimbursement, the lower court similarly erred in refusing to recognize it as part of the amount realized on the disposition of the property under section 1001. Its opinion disposed of the payment by calling it "in essence no different from" the expense reimbursements already classed as income under the *Glenshaw* trilogy (p. 16a, *infra*). Yet this is a still more perverse misreading of the three cases since certainly none faced the question whether a payment was a return of capital under section 1001. So classifying the payment would do no more for Ritter than to tax him just as if his involuntary transfer had not intervened and he had received the fair value from a purchaser in a normal sale. Since the employer's reimbursing payment is simply a substitute for money the purchaser would have paid Ritter absent the forced sale, to treat it as part of the amount realized on the

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[5] It is indisputable that Ritter himself is engaged in "trade or business" even though an employee, *e.g.*, Dean L. Phillips, 9 CCH Tax Ct. Mem. 501 (1950); I.T. 3373, 1940-1 C.B. 28. The widespread existence of the present expenses, which attend thousands of job transfers annually (see pp. 13-14, *infra*), mark them as "ordinary and necessary." Welch v. Helvering, 290 U.S. 111, 114 (1933).

sale is fairly to recognize what tax authorities admit to be "the practical effects of the transaction."[6] Indeed, had IBM purchased Ritter's house from him directly at its appraised fair value to facilitate his transfer—as some companies do, *Management Record,* Dec., 1962, p. 17—the substance of the transaction would be identical, and yet in such instances there is no indication that the Service has ever questioned the inclusion of the full payment as amount realized under section 1001.

The Court of Claims' interpretation of the Code gives rise to a direct conflict with the Tax Court. That court has flatly held that reimbursements for move-related expenses due to an employer-caused transfer are *not* includible in income. *John E. Cavanagh,* 36 T.C. 300 (1961), *nonacq.,* 1962-2 C.B. 6; *Homer H. Starr,* 46 T.C. 743 (1966).[7] The reimbursed expense

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[6] S. Rep. No. 830, 88th Cong., 2d Sess. 129 (1964). See also Tocker, Loss on Sale of Residence Reimbursed by Employer, 19 Tax L. Rev. 527, 532 (1964): "[T]he view that the reimbursement of the loss is a restoration of capital is economically more realistic. . . . [T]he reimbursement is not dependent on achievement or work performed of any sort." The Tax Court similarly classed house loss reimbursements as amount realized for more than fifteen years. Otto Sorg Schairer, 9 T.C. 549 (1947). It has reversed its position despite several dissents including that of Judge Raum. Harris W. Bradley, 39 T.C. 652, aff'd, 324 F.2d 610 (4th Cir. 1963).

[7] *Starr* is now pending on appeal in the Tenth Circuit. While there is court of appeals precedent favoring the Service, notably a decision contrary to *Starr* and *Cavanagh,* England v. United States, 345 F.2d 414 (7th Cir. 1965), cert. denied, 382 U.S. 986 (1966), the Tax Court in *Starr* expressly declined to follow *England.* 47 T.C. at 748. Other decisions also lend some support to the Service on various points, *e.g.,* Commissioner v. Mendel, 351 F.2d 580 (4th Cir. 1965) (deductibility), but the Government's assertion below of broad court of appeals' support for its views is based on cases that are for the most part distinguishable and did not, in any event, give the issues the consideration they deserve.

items held excludable in those cases are not distinguishable, as the Service itself has declared, from those the lower court has included in income in this case.[8] As the Tax Court *en banc* said in *Starr,* "[W]here the transfer of an existing employee is solely at the behest of the employer and where the cause of the temporary [reimbursed] expenditure is outside the control of the employee, the expenses are incurred primarily for the benefit of the employer." 46 T.C. at 747. The Tax Court, the forum most expert in tax matters, has given the current problem by far the most careful analysis, and this Court has stressed the deference due to it on questions of tax law as well as of fact. *Trust of Bingham* v. *Commissioner,* 325 U.S. 365, 371 (1945); *Dobson* v. *Commissioner,* 320 U.S. 489, 502 (1943). The conflict itself, therefore, is a powerful reason for review.[9]

Certiorari is further justified by the striking inconsistency of the Service's position which has now been sanctioned by the court below. In a long-standing revenue ruling adhered to in this very case, the Service concedes that no gross income results from employer

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[8] The pertinent expenses were unusual temporary living expenses at the new location, in one case incurred because household goods were in transit and in the other because the new house was not ready for occupancy. 36 T.C. at 301; 47 T.C. at 744. The Service has said "there is nothing in the character . . . [of such expenses] which is different" from the type involved here. Rev. Rul. 65-158, 1965-1 C.B. 34, 35.

[9] It is noteworthy that the courts of both Canada and England have concluded that reimbursements for loss or expenses in a change of houses due to an employer-directed transfer are *not* includable in income. Ransom v. Minister of National Revenue, 67 CCH Dominion Tax Cas. 5235 (Can. Exch. 1967); Hochstrasser v. Mayes, 38 Tax Cas. 702 (H.L. 1959).

reimbursement for the cost of transporting family and goods or for meals and lodging en route where transfer is required. Rev. Rul. 54-429, 1954-2 C.B. 53. It seeks to distinguish such reimbursements from all other move-occasioned expense reimbursements on the singular ground that the former cover "direct" expenses and are not income while the latter relate to "indirect" expenses and are therefore taxable as ordinary income. This improvised distinction is as inaccurate in fact as it is unjustified by anything in the Code, the trial commissioner having expressly found that *all* Ritter's disputed expenses were caused by the move as their very nature indicates (p. 24a, *infra*). No doubt such an arbitrary line might be drawn by a legislature but, as Judge Davis' dissent said in considering deductibility, "I can make no distinction, as a judge, between 'direct' and 'indirect' moving expenses . . ." (p. 16a, *infra*). The only opinion to consider in detail the Service defense of its artificial labeling demolished the attempt. *Homer H. Starr,* 46 T.C. 743, 746 (1966). Indeed, until recently the Service itself, despite its 1954 ruling, *supra,* in practice treated both types of expense payment as equally excludable from income, the proper and consistent position to which the Service should be remitted. *Wall St. J.,* Dec. 9, 1965, p. 1.[10]

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[10] The Service continues in other contexts to exclude from income reimbursements for "indirect" expenses. Thus, it recently held not to be gross income a hospital's reimbursements for the motel bill and other temporary expenses of the taxpayer and his wife incurred because of "the requirements of the hospital" that their child be observed without them at home for a research project. Rev. Rul. 67-407, 1967 I.R.B. No. 47, at 7. The transferred employee is on the Service's theory taxable on reimbursement for similar temporary quarters, see n. 8, *supra,* that are no less caused by the "requirements" of his employer.

**II. The Tax Consequences of Moving Expense Reimbursements Are of Importance to Thousands of Taxpayers Every Year and Have a Substantial Impact Upon the Personnel Policies of Industry, the Federal Government and the Military.**

There can be few issues of tax law that affect so many persons. A recent estimate put at 400,000 the number of families moved interstate every year by employer transfers, *Wall St. J.*, Dec. 9, 1965, p. 1, a figure consonant with the extraordinary mobility of the American population, *Statistical Abstract of the United States: 1967*, tables 34-35, and certainly correct in indicating the order of magnitude of the transfers. A single large company such as IBM, which employed over 220,000 persons at the end of 1967, may relocate 3½ to 4 percent of its entire complement of employees each year (p. 27a, *infra*). And the trend in the number of transfers, spurred by increasing growth and decentralization of industry and rising costs of training new employees, is upwards.[11]

The number of companies recompensing employees for move-related expense and loss is constantly increasing, as more and more of them find it fair and necessary to adopt reimbursement policies. A recent survey of companies chosen from *Poor's Register of Corporations* showed that 77 percent maintained such policies, while among the largest companies with proportionately more employees the policies were almost universal. White, *supra* n. 11, at 9-10. Consequently, the question whether such reimbursements are taxable arises every year for a vast collection of industry-transferred taxpayers, almost certainly num-

[11] White, Reimbursing Personnel for Transfer and Relocation Costs 7, 9, 11 (1964: American Management Ass'n Research Study 67); Wall St. J., Dec. 9, 1965, p. 1.

bered in the hundreds of thousands. In addition, the companies themselves repeatedly face the parallel question whether to withhold taxes upon these payments or risk tax penalties imposed by the Service, and on this score, too, considerable confusion has prevailed among employers. *Financial Executive*, Dec., 1965, pp. 10, 20.

A still greater number of individuals in the federal civil and military service are afflicted with this tax dilemma. In 1966 Congress enacted Public Law 89-516, 89th Cong., 2d Sess., authorizing civil servants transferred by the federal government to be repaid for a number of specified, move-related expenses: included are costs of a house-hunting trip, certain expenses in sale and purchase of residences, and a temporary residence allowance. Each of these items is regarded by the Service as "indirect" and therefore taxable, Rev. Rul. 65-158, 1965-1 C.B. 34-35, and one or more is likely to be incurred by the 35,000 or so civil servants annually transferred. *Hearings, supra* n. 4, at 16, 53. Among military transferees, "indirect" moving expenses are compensated through a so-called dislocation allowance, and consistent with its practice toward company employees, the Service has also recently classed these dislocation payments as income. Rev. Rul. 64-153, 1964-1 C.B. (pt. 1) 70. On behalf of the 340,000 servicemen who received such allowances in fiscal 1965 alone, the Department of Defense has vigorously protested this interpretation of the law to the Service. See n. 4, *supra*.

As is obvious in the case of civil servants and military personnel but also true of industry transferees, the present tax falls mostly upon families of moderate income. Taking as examples two private

companies, a congressional witness testified that 85 percent of transferred employees in one and 91 percent in the other earned less than $15,000 a year, *Hearings Before the Senate Finance Committee on H.R. 8363,* 88th Cong., 1st Sess. 2008 (1963) (pt. 4); in IBM almost half the transferees earn $10,000 or less (pp. 30a-31a, *infra*). Most of these relocations, as here, effect no compensating promotion for the employee. *Wall St. J.,* Dec. 9, 1965, p. 1. Again as in this instance, a net loss is likely to be suffered on most moves, even if reimbursements are not taxed, because they rarely encompass all the consequent monetary costs.[12] To a family already suffering this financial drain, as well as the social difficulties of relocation, a tax upon the limited reimbursement the family receives from the employer merely to lessen the dollar loss is an especial hardship.

Not only employees but the industrial economy and federal personnel policy as well have a major stake in the present question whether reimbursement is to be impaired by taxation. As Congress clearly stated in allowing deduction of certain moving expenses under section 217, see p. 17, *infra,* national policy makes it "important to remove deterrents to the mobility of labor" in the interests of full employment.[13] The

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[12] *E.g.,* pp. 33a-34a, *infra.* Speaking of the reimbursements to soldiers, the Defense Department stated: "Placing a tax on their dislocation allowances serves only to reduce further an already inadequate allowance." Letter from Assistant Defense Secretary Paul, *supra* n. 4.

[13] H. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963). See also H. Doc. No. 43, 88th Cong., 1st Sess. 13-14 (1963) (President's message); Hazelwood, Costs Incurred by an Individual Who Moves in Connection With His Employment: A Tax Analysis, 20 Tax L. Rev. 365, 370-71 (1965).

Chairman of the Civil Service Commission, supporting enactment of the above-described Public Law 89-516 to allow moving expense reimbursement to federal employees, emphasized that the Government is the "prime beneficiary" when its employees consent to transfers and reasonable mobility is "an essential element in a sound career service." *Hearings, supra* n. 4, at 6. Yet this mobility, whether in aid of government or the business economy, is materially impeded under the decision below: for the tax, as this case shows, can be extremely heavy for the moderately paid individual and may well decide him against a move. *E.g., Wall St. J.*, Dec. 9, 1965, p. 1. As the Senate Committee stated in approving the federal reimbursement bill, its "general purpose and effect . . . would be seriously diluted if the [reimbursements] authorized thereunder are deemed taxable as income." S. Rep. No. 1357, 89th Cong., 2d Sess. 5 (1966).

The instant case is an appropriate means of resolving the doubts and difficulties that the Service's position on reimbursements has engendered. The critical facts are not in controversy. Nor is there anything in the circumstances peculiar to Ritter on which the Service rests its case; rather it asserts generally that any moving expense or loss reimbursement to any taxpayer, apart from three expense items it labels "direct," must be taxed as ordinary income under its construction of the Code. Finally, Ritter has advanced below and so preserved for review the basic pertinent legal arguments, and the expenses and loss involved here are entirely typical of those suffered in thousands of relocations across the country. For example, preeminent among the reimbursed items in this case are the expenses and loss related to the change of houses;

a 1962 survey of large companies showed about 85 percent of the companies reimbursed for such losses, expenses, or both. *Management Record,* Dec., 1962, p. 20.

The importance of review by this Court is enhanced by Congress' declaration that the solution to the present reimbursement problem must be sought not in yet another amendment to the Code but through judicial elaboration of existing case law and statutes. In 1964, Congress added section 217 to the Code to equalize the tax treatment of reimbursed employees changing job locations and others who were not reimbursed; it did so by allowing the latter a deduction for unreimbursed expenses. Declining to settle what it recognized to be the dispute between the Tax Court and the Service on the reimbursements properly excludable from income, Congress limited its legislation to the three "direct" expense items concededly excludable even in the view of the Service. In so framing section 217, which consequently leaves the present problem wholly unaffected, the House and Senate Committees took pains to state that:

> "the question of whether the exclusion [of reimbursements from income] for existing employees extends beyond these three categories is left for judicial interpretation." [14]

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[14] H. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963); S. Rep. No. 830, 88th Cong., 2d Sess. 72 (1964). Consonantly, both Committees warned that "no inference should be drawn from [section 217] . . . that moving expense exclusions under existing law are necessarily limited to these three categories of [direct] expenses." H. Rep. No. 749, *supra,* at 59; S. Rep. No. 830, *supra,* at 71-72. The Senate would have made it clear that reimbursements for loss and expenses on the change of residence were not ordinary income, S. Rep. No. 830, *supra,* at 129-31, but the House Committee's refusal to legislate on the exclusion question at all prevailed. Conf. Rep. No. 1149, 88th Cong., 2d Sess. 49 (1964).

This legislative background all but rules out a statutory solution to the present question, despite some expressed sentiment in Congress favoring exclusion of "indirect" expense reimbursements from income. See nn. 6, 14, *supra*. Since the Tax Court has adhered to its ruling that "indirect" moving expense reimbursements are not income despite the nonacquiesence of the Service (p. 10, *supra*), litigation will proliferate indefinitely unless and until this Court gives its judgment. Tax Court decisions can be appealed in every circuit court in the country, and neither the Service nor the taxpayers are likely to change their positions until a conclusive resolution is attained. Moreover, additional thousands of taxpayers whose companies now withhold taxes on reimbursements under compulsion by the Service may well forego their claims and suffer irreversible damage through ignorance of the dispute or inadequate financial incentive to sue where the law is unclear and the sum in issue too small to warrant individual litigation.

In sum, as this Court stated in granting certiorari in the *Glenshaw* case itself: review is warranted because of "the frequent recurrence of the question and differing interpretations by the lower courts of this Court's decisions bearing upon the problem . . . ." 348 U.S. at 427.

## CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1968

## APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 394—64

(Decided April 19, 1968)

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JAMES J. RITTER

v.

THE UNITED STATES

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DANIEL M. GRIBBON, *attorney of record, for plaintiff.* BRICE M. CLAGETT and COVINGTON & BURLING, *of counsel.* KNOX BEMIS, with whom was *Assistant Attorney General* MITCHELL ROGOVIN, *for defendant.* PHILIP R. MILLER, *of counsel.*

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Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, and SKELTON, *Judges.*

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### Opinion

PER CURIAM: This case was referred to Chief Trial Commissioner Marion T. Bennett with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a).

The commissioner has done so in an opinion and report filed on August 16, 1966. Exceptions to the commissioner's report and opinion were filed by the parties and the case has been submitted to the court on the briefs of the parties and oral argument of counsel. Since the court agrees with the commissioner's findings, opinion and recommended conclusion of law, as hereinafter set forth, it hereby adopts

the same as the basis for its judgment in this case.* Therefore, plaintiff is not entitled to recover and the petition is dismissed.

**Opinion of Commissioner**

BENNETT, *Chief Commissioner:* This is an action to recover federal income taxes and interest thereon attributable to certain payments made to plaintiff by his employer in 1958. The issue is whether these payments, which were occasioned by a transfer of plaintiff's place of employment for the convenience of his employer, constitute ordinary income to plaintiff and, if so, whether plaintiff taxpayer may deduct as expenses the items for which payments were made. It is concluded on the law and the evidence that the payments are taxable as ordinary income, are not deductible, and that plaintiff's claim must be dismissed.

In the summer of 1957, plaintiff, then Regional Controller for the Western Region of the Data Processing Division of International Business Machines Corporation, hereinafter referred to as IBM, was informed that the Western Regional Headquarters were to be moved from San Francisco to Los Angeles in the fall of 1958 and that he, as Regional Controller, would similarly be required to relocate in order to retain his position within the company. At the time of plaintiff's move, it was IBM's established policy to reimburse its employees for certain expenses incurred when they were required by IBM to transfer from one location to another on a permanent basis. The tax effect of these reimbursements is now contested.

The first reimbursement question relates to IBM's so-called "Moving and Living Expense Policy" under which IBM reimbursed plaintiff for certain expenses he incurred in arranging for the sale of his home in the Mill Valley

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* The concurring in part and dissenting in part opinions of DAVIS, *Judge,* and SKELTON, *Judge,* follow the opinion of the Trial Commissioner which has been adopted by the court.

area of San Francisco, the movement of his household to Los Angeles, and the acquisition of a new home in the Los Angeles area. These reimbursed expenses which totaled $4,177.46 were not included by taxpayer in his income. It is the Service's basic disagreement with this treatment which is the essence of the present dispute.

Relying upon Rev. Rul. 54-429, 1954-2 CUM. BULL. 53, the Internal Revenue Service included the reimbursements for the following so-called "indirect expenses" in plaintiff's income:[1]

| | |
|---|---|
| (a) Real estate appraisal of plaintiff's residence in Mill Valley | $130.00 |
| (b) Advertising the Mill Valley residence for sale in the Wall Street Journal | 15.75 |
| (c) Various upkeep and double interest charges for Mill Valley residence pending its sale after move to Los Angeles | 330.78 |
| (d) Closing costs on purchase of Los Angeles home | 500.00 |
| (e) Installation of carpeting in Los Angeles home | 132.82 |
| (f) Miscellaneous expenses of the move | 100.00 |
| (g) Remaking and rehanging draperies in Los Angeles residence | 245.00 |
| Total | 1,454.35 |

There is no dispute between the parties that these expenses were actually incurred, that they would not have been incurred but for the move required by IBM, or that they are reasonable in amount.

[1] It should be pointed out that a portion of the reimbursed expenses ($2,723.11) designated by the Service as "direct moving expenses" (*i.e.*, the expenses of moving himself, his family, and his household goods), while not included by plaintiff in income, is nevertheless recognized by the Service as a proper exclusion from income and is not in issue in this proceeding.

The next item of reimbursement in issue is under a policy called the "Home Guarantee Policy,"[2] which provided financial assistance to all employees of IBM who owned homes they had to sell in order to transfer to a new location. The plan provided that an employee required to move at the request of IBM would receive no less than a guaranteed return upon the sale of his home, equal to its "appraised value" at the time of the required move. In summary, the Home Guarantee Policy was administered in the following manner: An employee's home would be appraised by two independent, qualified appraisers. One appraiser was selected by a local bank appointed by IBM to administer the policy in the particular locality and the other appraiser was selected by the employee from a list of qualified appraisers furnished the employee by the local bank. If the two appraisals differed by more than 5 percent, a third appraiser would be selected by the employee from the bank's list. The appraised value was the average of the two highest appraisals. Once the appraised value was determined, the employee could elect to enter into the Home Guarantee Policy under which IBM would guarantee that upon the sale of the home the employee would receive the full appraised value. The policy provided:

> If the net selling price of the employee's home is less than its appraised value, IBM will reimburse the employee for the difference between the two amounts.

The net selling price was defined as the selling price less certain selling costs, such as broker's commission, lawyer's fees, tax stamps, and title insurance.

Plaintiff's residence was appraised under the policy at $38,737.50. Despite the selling efforts of the plaintiff, the

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[2] At the time of the appraisal of plaintiff's home, IBM's Home Guarantee Policy was formally embodied in a document entitled "Moving and Living Policy—Financial Assistance Plans for Regular IBM Employees Moved at Company Request."

local bank and local realtors, a firm offer to purchase the residence was not received until October 2, 1958, some 2 weeks after plaintiff had moved to Los Angeles. The offer to purchase was at a gross price of $34,000 and, since this offer was more than 10 percent below the appraised value, under the terms of the policy, the special consent of IBM had to be obtained before the offer could be accepted.

The local bank recommended acceptance, IBM agreed, and the transaction was closed with the plaintiff selling his residence to an unrelated third party for $34,000 on November 6, 1958. It does not appear that the appraised value of plaintiff's residence was inflated to give him any amount over the fair market value at the time IBM directed his transfer. On November 6, 1958, plaintiff's basis for determining gain or loss was $37,640.67.

Under the terms of the Home Guarantee Policy, the net selling price received by plaintiff was $31,665.60. IBM reimbursed plaintiff for the difference between $31,665.60 and $38,737.50 for a net of $7,071.90. The Internal Revenue Service included this amount in plaintiff's gross income for 1958 as additional compensation. Plaintiff has paid a capital gains tax and resists the higher payment arising from defendant's treatment of the sums involved as ordinary income.

*The Moving and Living Expense Policy*

Plaintiff contends that he should not be required to pay income taxes on amounts received by way of reimbursement for expenses resulting from a move undertaken primarily for the convenience of his employer. More specifically, plaintiff contends that these reimbursements are not income as defined by the Internal Revenue Code of 1954, § 61, 68A Stat. 17, in that these reimbursements do not constitute wages, incentive compensation, or any other form of income nor do they bear "the essential elements of income." Alternatively, plaintiff contends that in the event

these reimbursed expenses are income, then he is entitled to a deduction under sections 62 and 162 of the Code. 68A Stat. 17, 45.

Section 61(a)(1) of the Internal Revenue Code of 1954 provides:

> (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;

The Treasury Regulations on Income Tax (1954 Code), section 1.61-1(a), state: "Gross income means all income from whatever source derived, unless excluded by law." 1 CCH 1966 Stand. Fed. Tax Rep. ¶ 630.

The Supreme Court has consistently given the term "gross income" as defined by the Revenue Code[3] a broad construction in order "to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). In *Commissioner* v. *Smith*, 324 U.S. 177 (1945), taxpayer's employer gave him, as compensation for his services, an option to purchase stock and the Court, holding the option to be taxable income when exercised, stated that the term gross income as defined by the Revenue Act "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." 324 U.S. at 181.

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[3] The 1938 and 1939 Revenue Codes (52 Stat. 457; 53 Stat. 9) defined gross income as income "in whatever form paid • • • derived from any source whatever" and the 1954 Code as "income from whatever source derived." 68A Stat. 17. Adjusted gross income is gross income minus allowable statutory deductions and exclusions.

In *Commissioner* v. *LoBue*, 351 U.S. 243 (1956), the Court again broadened the concept of what is taxable compensation. Taxpayer was granted an option by his employer to purchase stock. The Court held that it made no difference whether the option was intended to give the employee a proprietary interest in the business or whether it was intended to be compensation, but that as long as an *economic benefit* is conferred upon an employee for the purpose of securing better services, then the employee has realized taxable income. The Court said:

> We have repeatedly held that in defining "gross income" as broadly as it did in § 22(a) Congress intended to "tax all gains except those specifically exempted." * * *
>
> * * * When assets are transferred by an employer to an employee to secure better services they are plainly compensation. * * * Section 22(a) taxes income derived from compensation "in whatever form paid." * * * LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is "compensation for personal service" within the meaning of § 22(a). [351 U.S. at 246-47; § 61(a), 1954 Code, *supra.*]

In Rev. Rul. 54-429, 1954-2 CUM. BULL. 53, the Commissioner ruled that amounts paid by an employer, either directly or as reimbursements, to defray an employee's actual cost of moving himself and his family from one place of employment to another, where the change was primarily for the benefit of the employer, are excluded from gross income. However, amounts received as reimbursement for other expenses, sometimes called "indirect" or "extraordinary" expenses, related to the move do constitute income to the employee and no offsetting deduction is allowed.

Several courts of appeals have considered the tax consequences of indirect moving cost reimbursements and have

sustained the position of the Commissroner of Internal Revenue, holding such reimbursements includable in gross income and to be nondeductible personal living expenses. In *England* v. *United States,* 345 F. 2d 414 (7th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966), taxpayer was transferred by his employer from Kansas City, Missouri, to Springfield, Illinois. The court held that reimbursements for the costs of meals, lodging, and expenses incidental to securing housing at the new post were personal living expenses and includable in income and were nondeductible as business or travel expenses while away from home. See also *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963).

In *Commissioner* v. *Mendel,* 351 F. 2d 580 (4th Cir. 1965), taxpayer, a physician employed by the United States Veterans Administration, was required by the Government to move from Newark, New Jersey, to Richmond, Virginia, in 1957. In making the transfer, taxpayer incurred direct moving expenses for which he was only partially reimbursed. He sought to deduct the difference. The court, reversing the Tax Court and disallowing the deduction for the cost of packing, transporting, storage and handling of furniture in transit and for the cost of hotels and meals in transit, stated:

> • • • The approach we must follow in a resolution of the issue is one exemplified by United States v. Woodall, 255 F. 2d 370 (10 Cir. 1958), namely, that any economic or financial benefit conferred on an employee as compensation is gross income, and that there may be deducted from gross income only those expenditures expressly made deductible by statute.[4] Ordi-

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[4] United States v. Woodall, 255 F. 2d 370, 373 (10 Cir. 1958), "• • • it has • • • been long recognized that deductions are matters of legislative grace, *allowable only when there is a clear provision for them,* and do not turn upon equitable considerations. • • • What should be allowed as an expense deduction is a matter of policy for Congress, not the Courts." (emphasis supplied)

narily, reimbursement for moving expense to an existing employee would constitute gross income under the comprehensive definition in § 61(a) of the Revenue Code of 1954 * * *. Rev. Ruling 54-429, supra, sought to alleviate the rigors of the application of the statutory definition of gross income to reimbursement for moving expenses to an existing employee. An examination of the ruling discloses that its rationale is that reimbursement for moving expenses does not constitute gross income, *not,* as the Tax Court determined, that expenses of relocation are *per se* deductions for the employee. * * *. [351 F. 2d at 582; see also *Light* v. *Commissioner,* 310 F. 2d 716 (5th Cir. 1962).]

Plaintiff urges that *John E. Cavanagh,* 36 T.C. 300 (1961), should be controlling here. There, taxpayer was transferred from Washington, D.C., to Burbank, California, by his employer. Taxpayer was reimbursed for his transportation and moving costs and, in addition, reasonable living costs incurred in excess of living expenses while his household effects were in transit. The Tax Court held that Rev. Rul. 54-429, *supra,* applied and excluded all the expenses from income because it said such expenses should be regarded as the employer's expenses and not as reimbursement for the personal living costs of the taxpayer. The court said:

> * * * to the extent such reimbursements defray the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him, but to the extent such reimbursements defray only reasonable and necessary extraordinary food and lodging expense required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him. They are the employer's costs, not the employee's. To the extent the

above ruling would require the inclusion in income of reimbursement for such extraordinary food and lodging costs, it is not a correct interpretation of section 22(a) or section 24(a) of the 1939 Code or sections 61 (a) and 262 of the 1954 Code. The prohibition against the deduction of personal living expenses has reference only to such expenses as are ultimately chargeable to the taxpayer. It has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed. [36 T.C. at 304.]

In holding for the petitioner with respect to both the transportation of his family and household effects and the reimbursements for extraordinary costs of food and lodging, the court in *Cavanagh* was of the view that reasonable expenses in moving are not personal expenses (otherwise reimbursement would constitute taxable income) so that necessarily they must be ordinary and necessary business expenses. As ordinary and necessary business expenses, the court reasoned, taxpayer was entitled to deduct from gross income the unreimbursed portion thereof.

Plaintiff here now asserts that since his expenditures resulted solely from the transfer of IBM's Western Region Headquarters to Los Angeles, the reimbursements are properly an expense of IBM, thus not a personal expense so not taxable as compensation. Plaintiff suggests that the proper test is, "if the event which caused the expenses for which the reimbursement was made was for the convenience of the employer, then such reimbursement is excludable from gross income." In other words, plaintiff suggests a "but for" approach. This was the approach adopted by the Tax Court in *Cavanagh, supra,* but subsequently ignored by the Court of Appeals for the Fifth Circuit in *Light* v. *Commissioner,* 310 F. 2d 716 (5th Cir. 1962), questioned by the Court of Appeals for the Fourth Circuit

in *Commissioner* v. *Mendel, supra,* and disapproved by the Seventh Circuit in *England* v. *United States, supra,* and the Eighth Circuit in *Cockrell* v. *Commissioner, supra.*

There is no rule of federal income taxation that categorizes an item as "personal" and then automatically requires that the reimbursement for such item be included in gross income. The tax results of any item depend upon the context within which the payment was received or the expense was incurred. *Cf. Commissioner* v. *Duberstein,* 363 U.S. 278 (1960). The questions as to who was primarily benefited by the reimbursement, what event caused the expenditure or whether there was a loss are not necessarily determinative as to whether a payment is income under the tax law. Of course, when an employer reimburses an employee for an obviously personal expenditure, such reimbursement is clearly taxable as compensation, even though such expenditure be causally connected with furthering the employer's business. For example, if an employer reimburses an employee for income taxes payable upon his salary, such reimbursement is income, *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716 (1929); or, if an employer reimburses an employee for additional costs of driving a certain make of automobile or for living in a particular locality, such reimbursements would clearly constitute additional compensation. Similarly, if an employee is reimbursed for essentially personal expenses connected with an employer-directed move, such reimbursements are not excludable from income merely because the expenses would not have been incurred but for the move. *England* v. *United States, supra.*

Plaintiff also asserts that these reimbursements are not income in that the payments do not bear "the essential elements of income." He asserts that these reimbursements are not income because they were intended merely to alleviate a financial loss incurred as a result of the transfer. It is unnecessary to go into the matter of whether IBM intended

these reimbursements to be compensation. The law is well settled that the statutory definition of gross income is broad enough to include as compensation any economic or financial benefit from any source, conferred in any form on an employee, unless specifically exempted by statute. *Commissioner* v. *LoBue, supra; Commissioner* v. *Glenshaw Glass Co., supra; Commissioner* v. *Smith, supra.* IBM was concerned with getting its employee's talents transferred to the new location and, as such, the reimbursements were an incentive or inducement to get plaintiff to make the required move.

No claim has been made that these reimbursements were a gift; indeed, plaintiff specifically disavows any gift theory. IBM was motivated solely by its own business needs in making these reimbursements and since they are payments arising out of the employment relationship, conferring an economic benefit upon the taxpayer, *LoBue* requires these reimbursements to be included in income.

The next issue to be decided is whether plaintiff is entitled to a deduction under sections 62 or 162 of the 1954 Code for trade or business expenses. Plaintiff relies upon the principle of *Commissioner* v. *Flowers,* 326 U.S. 465 (1946). There the Court denied a deduction for commuting costs on the basis that the employer received no benefit from the taxpayer's choice of his place to live. Plaintiff, relying upon *Cavanagh, supra,* asserts that his expenses were incurred for the convenience of his employer because IBM required him to move to Los Angeles for its convenience. This contention has already been discussed. Just because these expenses were incurred as a result of an employer-directed move does not enable an employer to circumscribe the statutory prohibition against deducting any "personal, living, or family expenses." Int. Rev. Code of 1954, § 262, 68A Stat. 76. The deduction for personal or indirect moving costs has been denied by other courts as

noted above and was nowhere authorized by law or regulation.[4] Plaintiff is not entitled to the deduction claimed.

*The Home Guarantee Payment*

The final question to be considered is the tax consequences of $7,071.90 representing reimbursement for the loss on the sale of plaintiff's residence below the appraised value.

A decision of the Tax Court, *Otto Sorg Schairer*, 9 T.C. 549 (1947), lays down the now-abandoned rule that reimbursement for loss on the sale of a residence incurred as a result of a transfer to a new location is merely a return of capital. That is to say, the reimbursement should be treated for tax purposes as part of the amount realized from the sale of the taxpayer's residence and not as additional compensation to the taxpayer. RCA made a payment to a long-standing employee, transferred from New York to Princeton for the convenience of RCA. The payment represented the difference between the net selling price of the old residence and its cost. The court determined that the reimbursement was not income but additional proceeds from the sale of the home.

In *Jesse S. Rinehart*, 18 T.C. 672 (1952), the court limited the *Schairer* rule, holding that a payment received by an employee toward the purchase price of a new home at the new location was taxable as compensation in that it was an evidence of the employer's desire to assure the continued services of the employee. In *Arthur J. Kobacker*, 37 T.C. 882 (1962), a new employee was taxed at ordinary income rates on a reimbursement for loss on the sale of his home because the court found that the payment was bargained

[4] The Revenue Act of 1964, § 217, 78 Stat. 51, now permits an employee to deduct direct costs of moving his household goods and personal effects, including travel expenses, meals and lodging, to a new residence for employment at least 20 miles distant from his former residence.

for as a condition of accepting the new employment in a different city.

Finally, *Bradley* v. *Commissioner*, 324 F. 2d 610 (4th Cir. 1963), *affirming* 39 T.C. 652, held taxable as incentive compensation a payment by an employer reimbursing a new employee for the difference between the appraised value and the sales price of the old residence. The Tax Court, three judges dissenting, specifically declined to follow *Schairer*. The Court of Appeals affirmed, holding as "illusory" *Schairer's* reasoning that the payment was not compensation because it was intended only as a guarantee against loss of capital.

In *Bradley*, the home sale arose from circumstances where an employee left the employ of one company and went with a new company in a different city entirely for his own convenience. After the employee had been on the new job for 2 months, his new employer agreed to absorb any loss the employee might suffer on the sale of his residence at his former place of employment. The payment thereafter made was correctly found to be an inducement or a cash bonus to secure the services of the new employee[5] or a payment to secure better services, *LoBue, supra*, and not a return of capital. See also, to the same effect, *Willis B. Ferebee*, 39 T.C. 801 (1963).

Recently the Tax Court has reaffirmed its position in *Bradley, supra*, and *Ferebee, supra*, in a case bearing a similarity to the instant proceedings. *Ernest A. Pederson, Jr.*, 46 T.C. 155 (1966). Taxpayer, an employee of long standing with his company, was transferred for the convenience of his employer and at his employer's request from Detroit, Michigan, to Minneapolis, Minnesota. Several months after his transfer, taxpayer sold his Detroit residence at a loss notwithstanding a reimbursement by the

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[5] *United States* v. *Woodall*, 255 F. 2d 370 (10th Cir. 1958) *cert. denied*, 358 U.S. 824; *Kobacker, supra.*

employer of the selling expenses.[6] He attempted to distinguish cases in which a new employee was reimbursed for the loss from the sale of a house or of selling commissions from his own situation as an "old" employee with his company for 20 years. The court reviewed the history of these reimbursements and considered *Pederson* not to be distinguishable from *Bradley* and *Ferebee* and declared the reimbursement for selling expenses to be income. This was a final judicial abandonment of the rule in *Schairer, supra,* and of the line of cases given different tax treatment to old and new employees in similar factual situations. Additionally, the court said that such a reimbursement was not equivalent to direct moving expenses excludable as income under Rev. Rul. 54-429, *supra.*

Plaintiff argues strongly that the administration of the home guarantee plan did not operate as a subterfuge for additional compensation, but functioned only as a means of alleviating the financial loss which plaintiff sustained as a result of the required move. Thus, plaintiff argues that the payment was nothing more than a return of capital or a part of the amount realized from the sale under section 1001(a) of the Code, 68A Stat. 295, and that he has properly paid a capital gains tax on this transaction and owes nothing more.

In theory, when a taxpayer receives back funds which he has invested, these funds do not represent taxable income but are instead a return of capital. See generally 1 MERTENS, FEDERAL INCOME TAXATION § 5.06 (1962). However, the reimbursement in issue here cannot be considered as part of the amount realized from the sale of the home and, therefore, a return of capital. "A loss on the sale of a home is essentially a personal loss. Any reimbursement to the taxpayer of such loss means taxable income is realized."

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[6] Taxpayer reported his basis for the Detroit residence as $16,546 and the sales price as $15,000. The selling expenses amounted to $1,088 so taxpayer, even considering the $1,088 reimbursement, still suffered a net loss.

*James D. Hayes*, 25 CCH Tax Ct. Mem. 636 (1966). The reimbursement was separate and distinct from the sale. No reimbursement would have been made had plaintiff sold his home for the appraised value; no property interest whatever passed to IBM; the only *quid pro quo* IBM received was its employee's "peace of mind." IBM did not make such payments for the purely altruistic reason of alleviating a financial loss incurred by a move for its convenience, but for two good business reasons: To encourage plaintiff to make the required move by relieving him of anxiety and worry over the problem of selling his home and to assure IBM of his experience, talents and skills where and when it wanted them. As such, the reimbursement is an incentive payment, taxable as income, and in essence no different from the "moving expense reimbursement" considered under the first part of this opinion.

Defendant urges still another consideration upon the court in support of its contention that the Home Guarantee Policy contained elements of compensation in it for plaintiff. Under this policy plaintiff was guaranteed the average of the two highest appraisals. More, plaintiff was guaranteed this appraised value as the *net* proceeds on the sale of his home though it is within common knowledge that a seller of a home cannot hope to realize the gross sales price as his net return. Under such an arrangement, IBM might have to pay a premium price to insure plaintiff's move to Los Angeles. Indeed, as it turned out, the ultimate sales price was much less than the appraised price which was guaranteed and the latter was more than plaintiff's adjusted cost basis for determining gain or loss on the property. The knowledge that he was guaranteed such a favorable price was no little incentive to go along as his employer wanted. There is no valid basis for treating this reimbursement as a return of capital and excluding it from regular income.

Viewing this case in its simplest terms, the thrust of it is that plaintiff by reason of his employment was required

to move, that he sustained expenses and losses for which he was largely but not altogether made whole through the generosity and good business and personnel policies of his employer—but that if he has to pay a tax on these reimbursements as ordinary income his true income is distorted and he is made poorer because of the move for his employer's benefit. The term income, however, is a broad concept which includes any economic gain from whatever source,[7] and deductions and exclusions from it are specifically defined and must be strictly construed. *Commissioner* v. *Jacobson*, 336 U.S. 28 (1949); *Commissioner* v. *Glenshaw Glass Co., supra; Commissioner* v. *Smith, supra; Commissioner* v. *LoBue, supra.* Economic gain does not necessarily require profit in its usual sense. *United States* v. *Woodall, supra.*

Since taxable income is a statutory term and taxation does not profess to embody perfect economic theory, *Weiss* v. *Wiener*, 279 U.S. 333 (1929), nor to be based on implications or logic, *Cockrell, supra,* or equity, *Woodall, supra,* the relief in a situation such as here cannot be judicial but depends on legislative grace within the exclusive province of Congress[8] which alone can create deductions or exclu-

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[7] See generally 1 MERTENS, FEDERAL INCOME TAXATION § 5.03 (1962).

[8] Indeed, in the consideration of the Revenue Act of 1964, the House refused to accept a Senate provision which would treat part of such reimbursements as an additional amount realized from the sale of the home. However, non-action by Congress or the refusal of Congress to enact a particular provision affords the most dubious foundation for drawing inferences as to the intent of an earlier Congress. *United States* v. *Price*, 361 U.S. 304, 313 (1960); *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963). The enactment of a new code section does not necessarily indicate that the prior rule was to the contrary but only that it was unclear. *United States* v. *Midland-Ross Corp.*, 381 U.S. 54, 60 (1965). Thus, congressional failure to enact such a provision has no relevance in the determination of whether these reimbursements are taxable and has not been considered in our determination here.

sions from income as it has defined it in the statute in issue here. Int. Rev. Code of 1954, § 61, *supra; United States* v. *Olympic Radio & Television*, 349 U.S. 232 (1955).

DAVIS, *Judge*, concurring in part and dissenting in part:

I can pick my way through this stony field only by looking for the separate paths open to judges, on the one side, and to legislatures and administrators, on the other. Confronted with broad concepts in a statute, a judge has much greater difficulty and less authority in summarily drawing exact lines, based on practicality, than do legislators or those who are granted power to administer a regulatory or taxing system. My difficulty here as a judge is that, faced with the all-inclusive words of Section 61(a) of the 1954 Revenue Code, I can see no theoretical or principled difference between "direct" and "indirect" moving expenses.[1] Yet since 1954 the Internal Revenue Service has ruled that reimbursement for the former, and those alone, need not be included in gross income. Rev. Rul. 54-429, 1954-2 Cum. Bull. 53. Perhaps the IRS draws the authority to make this distinction, on pragmatic grounds, from its general regulatory power, or perhaps the ruling has to be accepted, in both its affirmative and its negative aspects, because of its age. *Cf. United States* v. *Correll*, 389 U.S. 299, 304-07 (1967). Certainly Congress could make the separation if it wished, but it did not do so for the taxable year with which we are concerned. With only "indirect" moving expenses before us, the safest course for me, as a judge, is to apply § 61(a) without regard to the Revenue Ruling but under the guidance of *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), and

[1] It is said that "direct" moving expenses are not subject to personal choice, but we all know of the great fluctuations in the forms and expense of moving household goods as well as the variations in modes and cost of transporting families. The small difference, in this respect, between "direct" and "indirect" expenses seems to me not the kind of distinction judges can find in a statute as broad and general as § 61(a).

*Commissioner* v. *LoBue,* 351 U.S. 243 (1956). In the light of the great scope of § 61(a), as indicated in those and comparable decisions, I concur with the court that the reimbursement for "indirect" moving expenses was includable in taxpayer's gross income, probably as part of his "compensation for services, including fees, commissions, and similar items."

I part company, however, on the deductibility of these expenses. The Tax Court, *en banc* (with three dissents), has recently ruled that, in almost identical circumstances, an employee-taxpayer can deduct his "direct" moving expenses as ordinary and necessary business expenses. *Edward N. Wilson,* 49 T.C. No. 43, ¶ 49.43 P-H T.C. decided Jan. 24, 1968; see, also, *Vaal R. Dodd,* P-H Memo T.C. ¶ 68,023, decided February 6, 1968. I agree with that view. Since I can make no distinction, as a judge, between "direct" and "indirect" moving expenses, and since, in the area of the deductibility of such expenses there is no precise statutory or administrative guidance, I must apply the rule of the Tax Court's *Wilson* case to the present taxpayer's "indirect" costs.

On the other aspect of the case, the "home guaranty payment", I agree with the court. Like the reimbursement for moving expenses, this payment appears to be "gross income" under § 61(a) as interpreted by the Supreme Court. Chief Commissioner Bennett's opinion rightly points out that a payment of this kind is not part of the proceeds of a capital asset and is not a return of capital. The remaining question is whether taxpayer is entitled to a deduction on account of the reimbursed house-loss. In *Edward N. Wilson, supra,* the unanimous Tax Court held, in the same opinion which upheld the deductibility of "direct" moving expenses, that a similar "loss from the sale of a personal residence does not constitute a capital loss", and also that the loss was not a deductible business expense. I accept that position and therefore concur on this point with our court which rules the same way in this case.

SKELTON, *Judge*, concurring in part and dissenting in part:

I join in the concurring and dissenting opinion of Judge Davis, except I would limit the "indirect costs" as deductible items to those costs which were reasonable expenses of the move. Of course, these costs will vary with the facts of each case, depending on the circumstances of the taxpayer and his station in life. Applying this rule to this case, I would hold that the only deductible "indirect costs" which appear to be reasonable as moving expenses are:

| | |
|---|---|
| Remaking and rehanging draperies ..... | $245.00 |
| Installation of carpeting ..... | 138.82 |
| Total ..... | 383.82 |

Of course the interest and taxes on the Mill Valley residence in the sum of $289.08 are deductible as such instead of moving expenses.

I would enter judgment according to this opinion.

**Findings of Fact**

1. Plaintiff, James J. Ritter, is, and at all times relevant here has been a citizen of the United States and now resides at 5138 Oakwood Avenue, La Canada, California.

2. Plaintiff's 1958 federal income tax return, hereinafter referred to as the 1958 return, a joint return with his wife, Hazel R. Ritter (now deceased), was timely filed with the District Director of Internal Revenue for the Los Angeles District.

3. The 1958 return as originally filed showed adjusted gross income of $20,028.82, taxable income of $14,542.84, with a total tax liability of $3,476.75.

4. In his 1958 return, plaintiff reported, among other items, an alleged long-term capital gain in the amount of $858.21 (correct figure should have been $858.71), as follows:

| Kind of property | Date acquired | Date sold | Sales price | Cost |
|---|---|---|---|---|
| Residence | 4/1/57 | 10/24/58 | $38,737.50 | $37,878.79 |

Fifty percent of the $858.21 capital gain was included in plaintiff's taxable income along with 50 percent of certain other long-term capital gains arising from the sale of securities; the alternative capital gains tax was not elected. The residence referred to was 377 Vista Linda, Mill Valley, California, a suburb of San Francisco, hereinafter sometimes referred to as the Mill Valley residence.

5. Upon audit of the 1958 return by representatives of the Commissioner of Internal Revenue, plaintiff's income tax liability for 1958 was increased from $3,476.75 to $8,060.39, an increase of $4,583.64. Plaintiff executed a partial agreement to the additional assessment and paid an additional amount of tax and interest in the amount of $1,462.23 on December 20, 1961 (tax of $1,259.63 and interest of $202.60). The balance of the deficiency, $3,324.01 (original deficiency of $4,583.64 less partial payment of $1,259.63), and interest thereon of $1,055.37 (or a total of $4,379.38) were paid in full on July 30, 1964, to the District Director of Internal Revenue for the Los Angeles District.

6. Plaintiff filed an amended claim for refund of his 1958 federal income taxes in the amount of $3,324.01, plus interest, on September 15, 1964, with the District Director of Internal Revenue for the Los Angeles District. The claim was rejected on November 4, 1964.

7. The amount of tax in controversy in this case arises from the treatment of two categories of items involved in plaintiff's 1958 federal income tax liability:

(a) Certain reimbursements, in the amount of $1,454.35 paid to plaintiff by his employer, International Business Machines Corporation, hereinafter referred to as IBM, for expenses plaintiff incurred incident to a move at IBM's request in transferring his

place of employment from San Francisco to Los Angeles, were included in gross income and no corresponding deductions were allowed; and

(b) an amount ($7,071.90) paid to plaintiff by IBM, representing the difference between the appraised value of plaintiff's Mill Valley residence at the time the transfer was directed by IBM and the net proceeds from the sale of his residence, was treated as ordinary income instead of proceeds from the sale of the residence.

8. Plaintiff was first employed by IBM in 1952, has continued to be so employed, and is now Regional Manager of Finance Administration for the IBM Western Region of the Data Processing Division, with headquarters in Los Angeles. In the early summer of 1957, plaintiff was the Regional Controller for the Data Processing Division, Western Region, located in San Francisco. Plaintiff was informed that the Western Region Headquarters were being transferred to Los Angeles and, thereafter, on September 17, 1958, he moved his residence in Mill Valley to the Los Angeles area (Pasadena).

9. At the time of plaintiff's move, IBM had in effect certain policies known as the "Moving and Living Expense Policy" and "Home Guarantee Policy," dated August 15, 1958, hereinafter sometimes referred to as the IBM policies. The IBM Home Guarantee Policy applicable to the sale of plaintiff's Mill Valley residence was more fully known as the "Moving and Living Policy—Financial Assistance Plans for Regular IBM Employees Moved at Company Request," effective May 23, 1957.

10. Under the IBM Moving and Living Expense Policy, plaintiff received $4,177.46 from IBM as reimbursements for expenditures he had incurred in 1958 in connection with his move from San Francisco to Los Angeles. The Internal Revenue Service allowed as regular employee travel ex-

penses or nontaxable reimbursement expenses the sum of $2,723.11, but rejected the following items in the total amount of $1,454.35, the tax treatment of which is in controversy:

| Expenses | Amount |
|---|---|
| Sale of Mill Valley Residence—Closing Costs: | |
| (a) Real Estate Appraisals | $ 130.00 |
| (b) Advertising—Wall Street Journal | 15.75 |
| Double Expenses Attributable to Owning Two Houses at the Same Time: | |
| (c) Interest on Mill Valley residence (September 15-October 1, 1958) | 46.72 |
| (d) Interest on Mill Valley residence (October 1-November 1, 1958) | 93.43 |
| (e) Interest on Mill Valley residence (November 1-December 1, 1958) | 93.43 |
| (f) Taxes on Mill Valley residence | 55.50 |
| (g) Water bill | 11.70 |
| (h) Watering | 5.00 |
| (i) Gardening | 25.00 |
| Purchase of Pasadena residence: | |
| (j) Closing costs | 477.85 |
| (k) Miscellaneous expense (remainder of authorized $500) | 22.15 |
| Refitting Property for Use in the New Residence: | |
| (l) Remaking and rehanging draperies | 245.00 |
| (m) Installation of carpeting | 132.82 |
| Miscellaneous Expense: | |
| (n) Various items, such as the movers' tip and numerous out-of-pocket costs | 100.00 |
| Total | 1,454.35 |

11. Under IBM's Home Guarantee Policy, plaintiff received $7,071.91 from IBM on November 7, 1958, representing the difference between the appraised value of the Mill Valley residence and the net proceeds from the sale of that residence. The federal income tax consequences of this payment are in controversy in this case. The amount of reimbursement was computed as follows:

| | | |
|---|---|---|
| (a) Appraised value under policy | | $38,737.50 |
| (b) Selling price | $34,000.00 | |
| (c) Less deductible selling expenses: | | |
| (1) Real estate brokerage commission | 2,040.00 | |
| (2) Legal costs | 44.40 | |
| (c) Less deductible selling expenses—Con. | | |
| (3) Mortgage prepayment premium (but not over $250) | 250.00 | |
| Total deductible selling expenses | 2,334.40 | |
| Net selling price | | 31,665.60 |
| Difference between net selling price and appraised value | | 7,071.90 |

12. All of the controverted reimbursements described in finding 10, above, as well as the home guarantee payment described in finding 11, above, were occasioned by plaintiff's 1958 move from San Francisco to Los Angeles; they would not have been incurred but for the move; and they were reported and substantiated to IBM as required by the IBM policies. Certain of the items as indicated below require additional explanation, as follows:

(a) *Brokerage commission of $2,040.* In the San Francisco area, the real estate commission is normally 6 percent and the special provisions of the IBM policies for areas with more than 5-percent customary commission were applicable.

(b) *Penalty premium of $250.* The plaintiff incurred a mortgage prepayment penalty of $611.52, but the IBM policies limit such reimbursements to $250.

(c) *Wall Street Journal advertisement.* Although not specifically authorized by the IBM policy then in effect, this reimbursement was approved.

(d) *Double interest expense for November 1958.* Although plaintiff actually sold his Mill Valley residence on November 6, 1958, his lending agency insisted upon the payment of a full month's interest for the month of November 1958, and IBM reimbursed plaintiff for this amount.

(e) *Miscellaneous expense of $22.15.* IBM limited reimbursements to $500 on account of the closing costs incurred in purchasing a new residence. The $22.15 miscellaneous charge, bringing plaintiff's total reimbursement up to $500, was more than used up by plaintiff in move-related expenditures. For example, plaintiff paid for the title policy coverage on his new residence in addition to that required by the mortgagee, as full title policy costs were not specifically covered by the IBM policy at that time.

(f) *Miscellaneous expense of $100.* The plaintiff, as a married man, fulfilled all the requirements of the IBM policy for reimbursement in the amount of $100. The plaintiff used some $20 to $25 of this amount to tip the employees of his movers, Allied Van Lines, Inc., and the remainder was expended on miscellaneous small expenses involved in the move.

13. The effect of the inclusion of the items mentioned in findings 10 and 11, above, in plaintiff's gross income for 1958, is as follows:

| Explanation | Additional taxable income (net) | 1958 taxable income | Tax | Additional tax |
|---|---|---|---|---|
| Per 1958 return | .... | $14,542.84 | $3,476.75 | .... |
| Partial settlement | $3,876.23 | 18,419.07 | 4,736.38 | $1,259.63 |
| Final payment | 8,526.25 | 26,945.32 | 8,060.39 | 3,324.01 |

14. IBM conducts its operations in some 23 plants and laboratories and 200 branch and district offices throughout the United States. Valid business reasons justify and require the locations of these facilities. IBM sells directly to its customers and, accordingly, the locations of its sales offices and its service representatives are determined largely by the places of business of its customers. Considerations dictating the locations of plants and laboratories include the following: Available labor force, adequate housing for employees, community attitude, transportation costs, and a desire to avoid exc ss concentration in any single area. The business of IBM has been growing rapidly. In 1958 it was and continues to be necessary to open plants and offices at new locations.

15. On occasion, IBM transfers plants or offices from one location to another, based on valid business reasons, such as those mentioned above. IBM has also transferred headquarters units, such as the move of the Data Processing Division Headquarters from New York City to White Plains, New York, in 1957, and the move of the Western Region Headquarters of the Data Processing Division from San Francisco to Los Angeles in 1958.

16. Once the decision is made to place an IBM operation at a new location, whether as a transferred or a wholly new facility, IBM finds it good business practice to transfer a cadre of experienced IBM employees to the new location. Despite the expense of moving personnel, IBM finds that it expedites putting a new location into effective operation promptly to have experienced IBM personnel and not to rely solely on hiring new personnel. The personnel transferred, either as a cadre of a plant or in the move of a headquarters, may be promoted to new responsibilities in connection with the move or they may be transferred in grade with no change in pay and no change in responsibility.

17. IBM does not follow a policy of transferring its employees about the country on any fixed schedule. It makes

as few transfers as possible and only as business needs require the move. It moves approximately 3½ to 4 percent of its total number of employees in any given year. In 1957, when the reimbursement policies here in issue were instituted, IBM was facing several "mass moves" to new facilities at new locations, and was worried that employees whom it wished to move to the new locations might not see fit to move. This was the chief reason why IBM adopted the reimbursement plans.

18. In 1958, an IBM employee who was transferred for IBM's convenience to a new location was eligible to receive the following reimbursements under the IBM Moving and Living Expense Policy to assist in defraying the costs of the move:

(a) Traveling and living expenses during and for a stated, limited period after arrival at the new location.

(b) Moving expenses, which included the movers' fee and various miscellaneous expenses, such as automobile registration in the new state; mileage on personal car or auto rental while house hunting; cleaning expenses of the old and new residences; disconnecting and reconnecting appliances moved to the new location; custodial care and related service while house hunting; installing and altering carpets and draperies; tuning of TV set and piano; and a flat minimal miscellaneous expense allowance.

(c) Expenses up to $500 relating to purchasing a new home, if the employee sold his old home under the Home Guarantee Policy and purchased a home at the new location within 1 year from the sale of his former home.

19. The payments made by IBM in accordance with the IBM policies were made for the purpose of reimbursing its employees for certain expenses and losses incurred by them in effecting the transfer of their homes and places of employment for the convenience of IBM. Such payments were made to facilitate and induce the prompt transfer of those

employees whom IBM desired to move to a new location and to achieve greater efficiency by eliminating causes of their worry and discontent about moving.

20. Another objective of the IBM policies was to effect transfers deemed necessary in the conduct of IBM's business at the minimum expense consistent with fair treatment of employees required to relocate their homes and places of employment for the convenience of IBM. Such payments were intended to induce more of the employees whom IBM wanted to move to make the decision to move. The IBM policies recognize that an employee transferred to a new location for the convenience of his employer is required to incur expenses and is exposed to possible loss on the sale of his home attributable solely to the required move.

21. The payments made under the IBM policies constitute part of the cost of conducting IBM's business at multiple locations. The expenses and losses reimbursed under the IBM policies were related to the transfer of an employee's home and place of employment for the convenience of IBM.

22. The adoption of the IBM Home Guarantee Policy in 1957 was directly related to the increase in IBM's business in the late 1950's necessitating the establishment of new plants and offices throughout the United States. Prior to 1957, IBM had a Moving and Living Policy but no Home Guarantee Policy. An expanding business required a mobile work force.

23. IBM considered establishing a Home Guarantee Policy that required it to purchase the home from the employee. It rejected this approach because of the personnel difficulties it envisioned in purchasing homes from its employees. Also, IBM did not want to go into the real estate business. Its business is manufacturing and marketing business machines.

24. IBM hoped that in practice its guarantee of the appraised value of the transferred employee's home would

result in employee homes sold under the policy selling on average at the appraised value. Some homes were expected to sell above the appraised value and some homes below the appraised value. In those cases where the home sold above the appraised value, after expenses of the sale, IBM did not and does not deprive the employee of the extra proceeds but did not and does not reimburse the selling commission and other such costs. IBM finds that homes appraised under the Home Guarantee Policy are selling for about 96 to 97 percent of their appraised value. In the San Francisco area IBM's experience has been favorable. In the period 1957-64, the Bank of America supervised the appraisal of 115 homes of transferred IBM employees. Twenty-three employees dropped out of the program for one reason or another. The remaining 92 homes, with few exceptions, appraised and sold under an IBM home guarantee, have been appraised close to the ultimate sales price.

25. The sale of the employee's house at the old location under the Home Guarantee Policy is administered by some 200 banks throughout the country. These banks enter into an agreement with IBM whereby they undertake to supervise the appraisal of the transferred employees' houses and to advise IBM and its employees on the sales. IBM chose to have banks administer the Home Guarantee Policy for two main reasons. First, it was desirable to have the policy administered by people familiar with the local real estate market. Second, administration by a bank would serve to insulate IBM from the employee's housing problems. IBM did not want to be in the position of feeling it was necessary to justify appraisals to its employees. Administration by banks would provide an independent judgment of the value of the home and the offers received. IBM avoids giving any instructions to the appraisers; it does not select the appraisers; it does not deal directly with the appraisers. IBM's comments on the operation of the appraisal system are channeled through the administering

banks and are concerned for the most part with situations where the appraised value exceeds the sales price, increasing IBM's expense. IBM's concern is to keep the cost of the program as low as possible.

26. The appraised value of a transferred employee's home was determined in accordance with the provisions of the Home Guarantee Policy, in a reasonable and objective manner, designed to insure that the employee would receive the fair market value of his home at the time transfer was directed, regardless of when or at what price the home was ultimately sold. Neither IBM nor the banks engaged to administer the Home Guarantee Policy attempted in any way to influence the appraisers selected under the policy in their determination of the fair market value of the property involved.

27. The difference, if any, between the appraised value and the amount received by a transferred employee from the purchaser of his home was paid to the employee by IBM only if the house was actually sold.

28. Payments made by IBM under the Moving and Living and Home Guarantee Policies were not taken into account in any way by the management of IBM in determining appropriate levels of compensation for employees. Federal income tax was not, and is not, withheld from payments under the IBM policies and was not withheld from the payments to the plaintiff mentioned in findings 10 and 11, above.

29. The IBM policies are not discriminatory. The higher-paid supervisory employees are governed by the same policies as lower-paid employees. Also, relatively more lower-paid employees are moved than higher-paid ones. In 1963, a typical year, the salary range of employees moved was as follows:

| | Percentage of transferred employees |
|---|---|
| Salary amount: | |
| $10,000 and under | 44 |
| $10,000-$15,000 | 30 |
| $15,000-$25,000 | 21 |
| Over $25,000 | 5 |

30. The only exception to the general proposition in finding 29, above, that the IBM policies apply to all employees, is in the instance of certain employees on temporary assignment as part of their regular IBM employment. These people may be in a location as long as a year, but with no expectation of remaining there and such employees are not eligible for the Home Guarantee Policy.

31. As to plaintiff's move, the decision to move the Data Processing Division, Western Region Headquarters, was made at IBM corporate headquarters in New York and the plaintiff was not consulted as to the wisdom of the move. IBM was constructing a new building in Los Angeles and occupancy was expected to be in the late summer or early fall of 1958. Plaintiff was told that the entire Data Processing Division, Western Region Headquarters, was to be transferred to Los Angeles and since the position of regional controller is a staff assistant to the regional manager, the plaintiff was asked and was expected by IBM to move to Los Angeles in the fall of 1958. One important factor in the location of the headquarters of the Western Region in the Los Angeles area was the inclusion of Texas in the region for the first time. This shifted the geographical center of the region to the south, away from San Francisco. Also, major customers of IBM in the aerospace industry had their operations in the Southern California area and it was and is an advantage to IBM to have regional headquarters near these customers.

32. Plaintiff was not singled out to move, as there was no discriminatory selection of personnel on account of salary level or position with IBM upon the transfer of the Data Processing Division, Western Region Headquarters, from San Francisco to Los Angeles.

33. Plaintiff continued to be the Regional Controller for the IBM Western Region after the 1958 move and was not promoted to his present position of Regional Manager of Finance and Administration until February 1963.

34. When notified of IBM's intention to transfer him from San Francisco to Los Angeles, plaintiff had three choices: (a) He could accept the transfer and move; (b) he could leave IBM; or (c) he could take a considerable demotion and remain with IBM in the San Francisco area. If he had insisted on staying in the San Francisco area, plaintiff would have been a salesman attempting to carve out a new territory and earning about $400 a month, plus any commissions that he could earn, versus the $21,000 a year that he was making as Regional Controller. Although the corporation did not pressure him, plaintiff knew that it was advisable for him to move. For example, the plaintiff's own superior in 1958, the then regional manager, did not agree to relocate with his position. He accepted a lower-paying job in Oakland, California, as an IBM branch manager with the result that his earnings dropped 30 percent in 1958 as compared to 1957. If the plaintiff had refused to move, he would have suffered a setback in his prospects with IBM from which it would have been difficult to recover.

Plaintiff was of the view that his only realistic choice was to accept the transfer and move.

35. If the plaintiff had refused the transfer, the alternative to staying in San Francisco at a lower-paying job with IBM, would have been to resign from IBM and find work with another company in the San Francisco area. If he had resigned from IBM, plaintiff would have lost service-based

benefits, such as, group life insurance and vacations. In addition, the IBM method of doing business and training its employees in its own specialized methods tends to give an IBM employee a special utility and competence for IBM work that is not readily transferable to another employer.

36. The plaintiff does not like to move about the country and his only transfer by IBM prior to or since the 1958 move was from Los Angeles to San Francisco in 1957.

37. When plaintiff moved to the San Francisco area in 1957, he considered himself a resident of that area and, in particular, a member of the Mill Valley community and would have preferred to remain there. He found San Francisco to be a beautiful and cosmopolitan city and considered Mill Valley to be a desirable place to live. It was his "home," as well as his legal residence. He had family ties in Mill Valley and in the San Francisco area and business acquaintances there outside his friends who were also employed by IBM. He belonged to a number of civic and business organizations in the San Francisco area.

38. Plaintiff did not enter into any agreement or understanding with IBM to use his move from San Francisco to Los Angeles as a means of increasing his compensation with or without incurring federal income tax liability.

39. Plaintiff was not reimbursed for all of his expenses occasioned by the move from San Francisco to Los Angeles. In 1958, plaintiff incurred and paid expenses of up to $5,000 in addition to those listed in finding 10, above, in connection with the sale of his Mill Valley residence and the establishment of his new residence in Pasadena, California. Furthermore, plaintiff had a 5½-percent mortgage on his Mill Valley residence but was required to contract for 6-percent financing on his new residence in Pasadena with a 7-percent second trust. He did not have to escrow (on "reserve" with the lending agency) local taxes and insurance in connection with the mortgage of his Mill Valley residence, but this was required in

Pasadena, thus increasing the monthly payments. Plaintiff was also out-of-pocket $361.52 of the mortgage prepayment penalty of $611.52, incurred on the sale of his Mill Valley residence, as IBM did not reimburse mortgage penalties in excess of $250.

40. The plaintiff's federal taxable income after adjustments, if any, by the Internal Revenue Service, for the years 1956, 1957, 1958, 1959, 1960, and 1961, respectively, was as follows:

| | |
|---|---|
| 1956 | $11,025.69 |
| 1957 | 14,203.63 |
| 1958 (the year in question) | 26,945.32 |
| 1959 | 19,911.93 |
| 1960 | 18,012.39 |
| 1961 | 21,024.22 |

In 1956, plaintiff's wife earned taxable income of $2,751.32 and, in 1957, $960.48, which amounts are included in the above figures.

41. On or about March 18, 1958, plaintiff asked to have his Mill Valley residence appraised in accordance with the IBM policies then in effect. The plaintiff, IBM, and the Bank of America followed the required procedure for forwarding information concerning the house and requesting, selecting and instructing the first two appraisers. The Bank of America selected an appraiser, Mr. J. M. Hackney, Jr., and the plaintiff selected Mr. William G. Rutherford from a carefully prepared and up-to-date list of independent real estate appraisers maintained by the Bank of America for this purpose.

Both J. M. Hackney, Jr., who appraised the Mill Valley residence at $32,450, and William G. Rutherford, who appraised the Mill Valley residence at $39,250, made written reports of their findings based on the willing-buyer, willing-seller concept as required by their instructions. Since there was more than a 5-percent difference between the first two

appraisals of the plaintiff's Mill Valley residence, a third appraisal was necessary. The plaintiff was notified of the appraisals and a third appraiser, Mr. Donald Geddes, was selected by the plaintiff and approved and instructed by the Bank of America as required by the IBM policies. Mr. Geddes, who appraised the Mill Valley residence at $38,225, like the first two appraisers, made a written report based on the willing-buyer, willing-seller concept. The Bank of America then notified plaintiff that the appraised value of the Mill Valley residence was $38,737.50, which is the average of the two highest appraisals of $39,250 and $38,225.

42. The appraisals of the Mill Valley residence made by Messrs. Hackney, Rutherford and Geddes were arm's-length, independent appraisals. Each was a recognized, experienced real estate appraiser. Plaintiff did not know any of these appraisers before their appraisals were made. None of these appraisers were influenced by officials of IBM or the Bank of America or by the plaintiff to arrive at anything other than the fair market value as defined in his instructions. Each appraiser found and reported what he judged to be the fair market value of the plaintiff's Mill Valley residence. The differences in the amounts of the three appraisals rendered in the case of plaintiff's home were not due to any improper influence having been brought to bear on any of the appraisers; they simply reflect honest differences in opinion as to the probable selling price of plaintiff's home. The use of the average of the two highest appraisals was a reasonable method to determine the appraised value of plaintiff's Mill Valley residence for the purposes of inducing the employee to move and assuring him that he could find out in advance of the move what he could expect to receive from the sale of his home.

43. The plaintiff accepted the IBM home guarantee of $38,737.50, entered into an agreement with IBM and co-operated fully with the Bank of America and local realtors

in the listing, showing, and selling of his Mill Valley residence. Despite the selling efforts, the Mill Valley residence did not sell at first and steps were taken to revive broker interest by lowering the asking price and making use of the multiple listing service which was authorized for the first time under the IBM policies iff the summer of 1958. Although plaintiff moved out of the Mill Valley residence on September 17, 1958, he did not receive a firm offer until on or about October 2, 1958. A deposit receipt was signed on that date, was sent to the Bank of America and approved by the bank and by IBM in accordance with the IBM Home Guarantee Policy. Final approval of the sale was given by R. G. Clift, Assistant to the Controller of the IBM Data Processing Division located in White Plains, New York. The special IBM concurrence in the bank's recommendation was needed because the bid was more than 10 percent below the appraised value. There is no evidence that M. Clift, the bank, or anyone else followed the bank's recommendation to accept the offer for anything other than good business reasons. Accordingly, plaintiff sold his Mill Valley residence at a gross sales price of $34,000 to an unrelated third party in a transaction which was closed on November 6, 1958. Shortly thereafter the Bank of America's escrow file was closed and IBM was so advised as required by the IBM policies.

44. The fact that plaintiff's home sold some 6 months after the appraisals were made under the Home Guarantee Policy, at a price lower than the appraised value and different from the estimates made by all three appraisers, does not reflect adversely on the honesty or objectivity of any of the appraisers. Real estate appraising is not an exact science, and any appraisal is simply an informed estimate of value. In the case of residential property, subjective considerations importantly affect the price that a seller is willing to take and that a buyer is willing to give, with the result that there can be significant variations between the ultimate sales price and honest, objective

appraisals. In the fall of the year, there is a noticeable slack in the real estate market in the Mill Valley area, which tends to cause the market price of residential property to decrease.

45. On November 6, 1958 (the date of the closing of plaintiff's sale of the Mill Valley residence), the basis for computing gain or loss for federal income tax purposes on a sale or exchange of plaintiff's Mill Valley residence was $37,640.67, computed as follows:

| Item | | Amount |
|---|---|---|
| Purchase price | | $32,000.00 |
| Purchase closing costs: | | |
| Capital items: | | |
| Title insurance | $222.90 | |
| Notary fee | 1.00 | |
| Recording deed | 3.90 | |
| Recording deed of trust | 8.00 | |
| California tax agency | 10.00 | |
| ATA inspection | 15.00 | |
| | | 260.80 |
| Capital improvements, draperies and carpets sold with the house | | 5,379.87 |
| Total | | 37,640.67 |

Plaintiff purchased his Mill Valley residence incomplete. The builder had run into financial difficulties and the house was bought on a special deal "as is." The plaintiff had to finish the construction and add major appliances, such as, an oven and dishwasher, and even had to provide light fixtures. Although plaintiff contributed substantially to the completion of the Mill Valley residence through supervision and actual work performed, no allowance for such services has been made in determining his tax basis for the residence.

## Ultimate Findings of Fact

46. Plaintiff was reimbursed for expenses incurred resulting from his transfer by IBM to a new permanent location. The reimbursements were made under established policies, administered in a businesslike manner and available to all employees required to relocate upon IBM's request.

47. The payments received by plaintiff under the Moving and Living Expense Policy and Home Guarantee Policy were intended by IBM to induce the employee to make the required move and to transfer his talents over to the new location with a minimal disruption in efficiency by relieving the employee of anxieties over the cost of moving his household to the new location, the sale of his home at the old location, and the cost of setting up a new home.

## Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

## APPENDIX B

### Internal Revenue Code of 1954

Sec. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

Int. Rev. Code of 1954, § 61(a)

Sec. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and Business Deductions of Employees.*—

(A) *Reimbursed Expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) *Expenses For Travel Away From Home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) *Transportation Expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) *Outside Salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer.

• • •

Int. Rev. Code of 1954, § 62(1), (2)

Sec. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;

. . . . .

* * *

Int. Rev. Code of 1954, § 162(a)(1), (2), as amended by Pub. L. No. 87-834, § 4, 76 Stat. 976-77 (1962) to strike from § 162(a)(2) "(including the entire amount expended for meals and lodging)" and to insert the above parenthetical clause.

Sec. 217. MOVING EXPENSES.

(a) *Deduction Allowed.*—There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(b) *Definition of Moving Expenses.*—

(1) *In General.*—For purposes of this section, the term "moving expenses" means only the reasonable expenses—

(A) of moving household goods and personal effects from the former residence to the new residence, and

(B) of traveling (including meals and lodging) from the former residence to the new place of residence.

(2) *Individuals Other Than Taxpayer.*—In the case of any individual other than the taxpayer, expenses referred to in paragraph (1) shall be taken into account only if such individual has both the former residence and the new residence as his principal place of abode and is a member of the taxpayer's household.

(c) *Conditions For Allowance.*—No deduction shall be allowed under this section unless—

(1) the taxpayer's new principal place of work—

(A) is at least 20 miles farther from his former residence than was his former principal place of work, or

(B) if he had no former principal place of work, is at least 20 miles from his former residence, and

(2) during the 12-month period immediately following his arrival in the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks.

(d) *Rules for Application of Subsection (c)(2).*—

(1) Subsection (c)(2) shall not apply to any item to the extent that the taxpayer receives reimbursement or other expense allowance from his employer for such item.

(2) If a taxpayer has not satisfied the condition of subsection (c)(2) before the time prescribed by law (including extensions thereof) for filing the return for the taxable year during which he paid or incurred moving expenses which would otherwise be deductible under this section, but may still satisfy such condition,

then such expenses may (at the election of the taxpayer) be deducted for such taxable year notwithstanding subsection (c)(2).

(3) If—

(A) for any taxable year moving expenses have been deducted in accordance with the rule provided in paragraph (2), and

(B) the condition of subsection (c)(2) is not satisfied by the close of the subsequent taxable year,

then an amount equal to the expenses which were so deducted shall be included in gross income for such subsequent taxable year.

(e) *Disallowance of Deduction With Respect To Reimbursements Not Included in Gross Income.*—No deduction shall be allowed under this section for any item to the extent that the taxpayer receives reimbursement or other expense allowance for such item which is not included in his gross income.

(f) *Regulations.*—The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section.

Int. Rev. Code of 1954, § 217, as added by Pub. L. No. 88-272, 78 Stat. 51 (1964), to apply to expenses incurred after December 31, 1963, in taxable years ending after such date.

Sec. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Int. Rev. Code of 1954, § 262

Sec. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164(d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

* * *

Int. Rev. Code of 1954, § 1001 (a), (b)

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No. 308

# In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES J. RITTER, PETITIONER

*v.*

UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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MITCHELL ROGOVIN,
*Assistant Attorney General,*
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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 308

JAMES J. RITTER, PETITIONER

*v.*

UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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In 1957, the petitioner was Regional Controller for the Data Processing Division, Western Region, of International Business Machines Corporation ("IBM"), and was located in San Francisco, California (Pet. 22a). When IBM decided to relocate its Regional Headquarters at Los Angeles, California, it asked certain employees, including petitioner, to move there (Pet. 26a, 31a). Petitioner could have remained in the San Francisco area, but in a lesser position, as a salesman or account executive. Although the company did not pressure him, petitioner accepted the transfer and moved on September 17, 1958 (Pet. 22a, 32a).

IBM paid petitioner an aggregate of $11,249 in connection with the move, $4,177 as reimbursement for expenditures he had incurred and $7,072 pursuant to a guarantee that if the proceeds of the sale of his San Francisco home did not reach a particular appraised value, it would pay him the difference (Pet. 22a, 24a).

The Commissioner of Internal Revenue allowed as regular employee travel expenses or nontaxable reimbursements of direct moving expenses (*i.e.*, the expenses of moving himself, his family and his household goods) $2,723 of the $4,177 which petitioner had received (Pet. 3a, 22a–23a). The remaining $1,454 in reimbursements for the indirect expenses set forth below was held to be includible in petitioner's taxable income and nondeductible (Pet. 3a, 23a):

| | |
|---|---|
| (a) Real estate appraisal of San Francisco residence | $130 |
| (b) Advertising such residence for sale | 16 |
| (c) Various charges pending sale, after move to Los Angeles (taxes, interest and upkeep, watering and gardening) | 331 |
| (d) Closing and miscellaneous other costs on purchase of Los Angeles residence | 500 |
| (e) Installation of carpeting in Los Angeles home | 133 |
| (f) Miscellaneous expenses of move | 100 |
| (g) Remaking and rehanging draperies in Los Angeles residence | 245 |
| | $1,454 |

The $7,072 paid to petitioner on the guarantee represented the difference between the $31,666 net petitioner obtained from the sale of the San Francisco residence[1] and a $38,738 "appraised value" as defined by IBM (Pet. 24a). This "appraised value" was an average of the two highest of three appraisals made in March 1958[2] (Pet. 34a–35a). The property was offered for sale for more than six months before a firm offer of $34,000 was received in October 1958 (Pet. 36a). The Commissioner disallowed petitioner's treatment of the $7,072 as part of the sales price of the house from which he had merely derived capital gain, ruling that this payment constituted ordinary income (Pet. 20a–21a, 22a).

In the resulting refund suit, the Court of Claims (two judges dissenting in part) sustained the Commissioner's ruling in all respects.[3]

1. The amounts IBM paid petitioner as reimbursement for indirect moving expense were gross income to him. Section 61(a) of the 1954 Code (Pet. 1b) states that "* * * gross income means all income from whatever source derived * * *." The term "gross in-

[1] The house was sold for $34,000 and the $2,334 difference between net proceeds and sales price was attributable to brokerage commissions, legal costs and a premium required on prepayment of the mortgage principal (Pet. 24a).

[2] The three appraisals were: $32,450, $38,225 and $39,250 (Pet. 34a–35a).

[3] Judge Davis would have allowed an expense deduction for the $1,454 in indirect expenses, and Judge Skelton would have allowed an expense deduction for $384 of the indirect expenses (Pet. 18a–20a). The court was unanimous, however, in holding that the $7,072 received on the guarantee was ordinary income to petitioner.

come" is "broad enough to include * * * any economic or financial benefit conferred on the employee as compensation whatever the form or mode by which it is effected." *Commissioner* v. *Smith,* 324 U.S. 177, 181; see *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716; *Helvering* v. *Clifford,* 309 U.S. 331; *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426; *Commissioner* v. *LoBue,* 351 U.S. 243. That Congress intended gross income to include an employee's reimbursements of expenses is implicit in Section 62(a)(2)(A) of the 1954 Code (Pet. 1b–2b), which allows deductions from gross income for specified business expenses of an employee for which he has been reimbursed by his employer;[4] if such reimbursement were not income, there would be no occasion to permit the deduction.

The holding of the court below that the payments from IBM to its employee fall within the statutory concept of gross income is in accord with all appellate decisions which have considered this and related questions. *England* v. *United States,* 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986 (reimbursed moving expenses of transferred employee); *United States* v. *Woodall,* 255 F. 2d 370 (C.A. 10), certiorari denied, 358 U.S. 824 (reimbursed moving expenses of new employee); *Koons* v. *United States,* 315 F.

[4] Reimbursements of employees for moving expenses are not covered by Sections 101–122 of the 1954 Code, which deal with "Items Specifically Excluded from Gross Income." The only exclusionary provisions which could conceivably have any relevance are Section 102 ("Gifts") and 119 ("Meals or Lodgings Furnished for the Convenience of the Employer"); and petitioner does not contend that they are applicable.

2d 542 (C.A. 9) (reimbursed moving expenses of new employee). Only the Tax Court has held that such receipts are not gross income. *Cavanagh* v. *Commissioner,* 36 T.C. 300 (1961), nonacquiescence, 1962–2 Cum. Bull. 6; *Starr* v. *Commissioner,* 46 T.C. 743.[5]

Petitioner argues (Pet. 6–9), however, that these sums should not be considered as income because if there is offset against the payment from his employer his personal expenditures that he would not have incurred but for the conditions of his employment, he had no net gain. But Congress expressly prohibited taxpayers from deducting any "personal, living, or family expenses" (1954 Code, Section 262), and it did not intend this provison to be circumvented by permitting an employee to exclude from his income reimbursement for personal expenses, even though such expenses were required by his employer and were essential to retaining his employment. For example, a corporation may require its salesmen or executives to don a clean shirt every day, to wear expensive suits, to drive a certain make of automobile, or to live in a fashionable suburb; but no part of the reimbursement for these personal costs would be excludable from income. Similarly, the payments here constituted IBM's reimbursement of the personal expenses of himself and his family.[6]

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[5] *Starr* is now on appeal to the Court of Appeals for the Tenth Circuit, No. 9370.

[6] Because the expenses were personal, they are not analogous to an employer's furnishing tools or office supplies for an employee's use on the job.

2. Nor are the expenses deductible. Almost all relate to the maintenance and sale of the residence formerly occupied by petitioner and his family and the acquisition and furnishing of a new residence. Petitioner's employer did not require such expenditures—petitioner and his family alone required them for their personal comfort. They are thus not deductible as "ordinary and necessary expenses * * * in carrying on any trade or business" (Section 162(a)) or as "traveling expenses * * * while away from home in the pursuit of a trade or business" (Section 162(a)(2)). The court below properly characterized petitioner's expenditures as nondeductible "personal, living, or family expenses." Its decision is in accord with all appellate courts which have considered the question. *England* v. *United States, supra*; *United States* v. *Woodall, supra*; *Commissioner* v. *Mendel*, 351 F. 2d 580 (C.A. 4); *Koons* v. *United States, supra*; *Light* v. *Commissioner*, 310 F. 2d 716 (C.A. 5); *York* v. *Commissioner*, 160 F. 2d 385 (C.A.D.C.). The Tax Court likewise has disallowed deductions for expenses incurred in the upkeep and sale of a former residence. *Wilson* v. *Commissioner*, 49 T.C. 406. See also *Commissioner* v. *Flowers*, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C.A. 5); *Commissioner* v. *Stidger*, 386 U.S. 287.

3. Contrary to petitioner's contention (Pet. 11–12), the position of the Service in this case is not inconsistent with the position of Rev. Rul. 54–429, 1954–2 Cum. Bull. 53, which excludes from income reimbursements for "direct" moving expenses—the cost of

transporting the employee himself, his family and his personal belongings. Petitioner argues that if such reimbursements are not income, it is arbitrary to include as income reimbursements for "indirect" moving expenses.[7]

By the Revenue Ruling, the Service has in effect indicated its willingness to treat as nontaxable the reimbursements for the cost of transporting the employee's immediate family and personal belongings to his new place of employment. While it may be that it would not have been unreasonable for the Commissioner to refuse to grant favorable tax treatment for such items, it was not arbitrary or capricious for the Commissioner to differentiate direct costs from the clearly personal expenses of hanging drapes, laying carpets, and purchasing a new home. See *England* v. *United States, supra.* The drawing of a rule of practical administration in an area of limitless factual variations, where many different lines could be drawn by individual courts, is entitled to respect, even though

---

[7] Examples of indirect moving expense for which reimbursement is taxable are set forth in Rev. Rul. 65–158, 1965–1 Cum. Bull. 34:

> * * * preliminary trips to the new place of employment to locate a suitable residence; the amount by which the net selling price of the employee's residence at the former place of employment fell below its appraised value; fees incurred in connection with the sale of that residence and the purchase of a different residence at the new place of employment; charges for connecting and disconnecting appliances and utilities; alteration and installation of rugs and draperies at the new residence; drivers and auto licenses required by the State to which the employee moved; and similar costs related to the move.

alternatives and improvements might be available. *United States* v. *Correll*, 389 U.S. 299, 306–307.

4. The 1964 enactment of Section 217 of the 1954 Code (subsequent to the year at issue), allowing, under limited circumstances, deductions for moving expenses of an employee and his family and their household goods, whether or not he is reimbursed by his employer, supports the Government's position rather than that of petitioner. It demonstrates that Congress recognized that a rational distinction could be drawn between the direct expenses of such a move and the other personal expenses that might be involved.[8]

5. The payment covering the difference between the appraised value of petitioner's house and net proceeds from its sale was ordinary income; it was neither a reimbursement for a deductible expense nor part of the proceeds of the sale of a capital asset. On this issue the decision of the court below is unanimous and is in accord with the current holdings of all other courts that have considered this question. *Bradley* v. *Commissioner*, 324 F. 2d 610 (C.A. 4); *Baum* v. *United States* (M.D. Tenn.), decided May 3, 1968 (21 A.F.T.R. 2d 1401); *Loflin* v. *United States* (W.D. Tenn.), decided March 8, 1967 (19 A.F.T.R. 2d 1091); *Harvey* v. *Commissioner*, decided June 5, 1967 (26 T.C.M. 565);[9] *Hayes* v. *Commis-*

[8] If petitioner were correct that personal expenses incurred in the course of moving were deductible under Section 162 of the 1954 Code (Pet. 3b), not only would the limitations of Section 217 be ineffective, but the very enactment of Section 217 would be superfluous.

[9] This case is pending on appeal before the Sixth Circuit, No. 18,284.

*sioner,* decided June 8, 1966 (25 T.C.M. 636); *Wilson* v. *Commissioner, supra.* Any loss on the sale of the residence would have been personal and thus, nondeductible. IBM's payment of the excess of the "appraised value" of the house over its "net selling price" was not part of the amount realized from its sale. Petitioner received the payment only because the proceeds from the sale itself fell short of the guaranteed amount, but no interest in the property passed to IBM.

Moreover, the payment reflected not the difference between the selling price of the house and its true value, but between the net proceeds and an "appraised value" that simply turned out to be too high. Since the house had been on the market for six months, the price petitioner received for it presumably reflected its true market value.[10]

The question here is essentially the same as that involved in *Commissioner* v. *LoBue,* 351 U.S. 243. There the employer allowed the employee to purchase property (common stock) at a price below its market value. Here, the employer guaranteed to pay an amount above the market value of property (the residence) that its employee was selling. In either case, the employer's commitment to give the employee the benefit

[10] Petitioner is incorrect in stating (Pet. 9) that there was a forced sale of the house. It was on the market for six months, with four different real estate brokers, as well as petitioner himself trying to sell it at a price higher than the eventual selling price (Tr. 94–95, 112, 114; Joint Ex. 62; Pet. 36a). The actual selling price was $1,550 above one of the three appraisals obtained under IBM's Home Guarantee Policy (Pet. 34a–36a).

of a price more favorable than the market price gives rise to ordinary income to the employee.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JAMES J. RITTER, *Petitioner*,

*v.*

THE UNITED STATES, *Respondent*.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

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The Government's memorandum confirms that this case squarely presents the purely legal question whether non-compensatory reimbursement for expenses and loss in a required job transfer is taxable to an employee as ordinary income. It concedes that a direct conflict exists between the lower court and decisions of the Tax Court on the expense issue and, significantly, makes no effort to discount the petition's detailed showing (pp. 13-18) that the question presented is of great practical importance and affects annually hundreds

of thousands of taxpayers.[1] Instead, the thrust of the opposition to certiorari is a premature, and unpersuasive, attempt to show that the Government is right on the merits.

In arguing that reimbursements must be included in gross income, the Government first invokes the broad definition of gross income set forth in *Commissioner* v. *Smith*, 324 U.S. 177, 181 (1945), together with supporting authorities. But that definition is explicitly limited (Mem., p. 4) to economic benefits conferred on employees "as compensation" and the uncontradicted showing in the petition (p. 7) is that neither in this case, nor in Federal employment or industry at large, is the reimbursement here involved viewed as "compensatory." On this crucial point, the Government makes no effort to refute this showing or establish that such reimbursements are intended to be, or do in fact operate as, compensation.

The memorandum then cites section 62(a)(2)(A) which in defining adjusted gross income allows deduction of reimbursed business expenses under certain circumstances. The Government's claim is that the present reimbursements are includible in gross income because Congress would not contemplate deduction if an item could be excluded from income in the first place. It is entirely clear, however, that the potential deductibility of a reimbursed expense item does not

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[1] The full formulation of the Tax Court's views on the expense issue is found in Homer H. Starr, 46 T.C. 743 (1966), which took into account and rejected the circuit court holdings relied on by the Government (Mem., p. 4). The Tenth Circuit, despite its earlier decision in the Government's favor, has now held the appeal in *Starr* under advisement for over a year, possibly awaiting disposition of the present test case by this Court.

imply that the reimbursement had to constitute gross income. For example, section 217(e) plainly states that a moving expense item otherwise deductible is not allowed when reimbursement for it "is not included in [the taxpayer's] gross income." In fact, the Government's own admitted exclusion of direct moving expense reimbursements from gross income, expense items alternatively deductible under section 217 in most instances, demonstrates that contrary to the Government's claim a reimbursement need not be gross income even though a deduction be allowed if it is returned as income.

The petition's point, that Ritter realized no net gain and therefore no income on the reimbursements because they merely alleviated employer-caused loss and expenses, is met by the contention that quite apart from any question of gain the expenses were "personal" and not deductible under section 262. This makeweight suggestion that exclusion of reimbursement for such expenses would circumvent the prohibition of that section is belied by the Service's own determination in Rev. Rul. 54-429, 1954-2 C.B. 53, applied and defended by the Government in this very case (Mem., p. 7). That ruling, despite section 262, excludes from income reimbursement for the expenses of transporting "personal belongings" and meals and lodging en route (Mem., p. 7). Whether an item is personal or not depends, of course, upon context, as the varying deductibility of educational and entertainment expenses confirms and the lower court here admitted (Pet., p. 11a). In any event, the argument for excluding the present reimbursements from gross income as non-compensatory payments working no net gain is wholly independent of the alternative claim that the expendi-

tures themselves are deductible. See *Homer H. Starr*, 46 T.C. 743, 745 (1966).[2]

The memorandum in opposition next attempts to reconcile the inclusion of the present reimbursements in gross income with Rev. Rul. 54-429's exclusion from income of so-called direct moving expense reimbursements. 1954-2 C.B. 53. The distinction is defended as a rule of practical administration that in this complex area is entitled to respect. This generality may warrant some discretion to choose between various tenable interpretations of a statute, but it hardly frees the Service to select a purely verbal distinction between direct and indirect expenses that are equally personal or not, equally occasioned by the employer's needs, and equally related to the employee's required relocation. Petitioner submits that this Court's decisions on gross income make it clear that the guiding consideration must be whether a payment effects compensatory gain, and a rule of practical administration must be an expression of the law and not an exception to it. Indeed, the crucial significance of the compensatory element in determining the income tax significance of reimbursements to employees has been recognized by the Service in administering section 119, governing meals and lodging provided by an employer. Within the last month the Service in interpreting this analo-

[2] Since deductibility is an alternative contention not discussed at length by the Government, it is necessary in this reply only to add that the Government's citation of supporting authority on this point must be balanced against the views of a number of disagreeing judges. *E.g.*, Judges Davis and Skelton's opinions in this case (Pet., pp. 18a-20a); Mendel v. Commissioner, 41 T.C. 32 (1963), rev'd, 351 F.2d 580 (4th Cir. 1965); England v. United States, 226 F. Supp. 762 (S.D. Ill. 1964), rev'd, 345 F.2d 414 (7th Cir. 1965), cert. denied, 382 U.S. 986 (1966).

gous Code provision has acknowledged that a criterion of exclusion is whether the benefits were made in the pursuit of "a substantial noncompensatory business reason." Rev. Rul. 68-354, 1968 I.R.B. No. 28, at 7.

No effort is made to relate the direct-indirect distinction to the compensation yardstick, or indeed to furnish it with any rational explanation. The memorandum does assert that Congress in enacting section 217 must have recognized a rational basis for distinguishing between direct and indirect moving expenses. That assertion is far wide of the mark: Congress was concerned only with eliminating the disparity in treatment between (a) employees whose reimbursements the Service excludes from income and (b) employees who were not reimbursed and were denied a deduction by the Service (Pet., p. 17). Not only did Congress decline to sanction the Service's direct-indirect distinction but both the House and Senate Committees expressly stated that the scope of the gross income concept as applied to move-related reimbursements was left for "judicial interpretation" (Pet., p. 17).

Finally, the attempt in the memorandum to pass off the petitioner's house loss reimbursement as governed by the stock option ruling in *Commissioner* v. *LoBue,* 351 U.S. 243 (1956), rests on the wholly false factual premise that no loss was suffered on the house sale. At trial the Government argued and vigorously attempted to prove that the house loss guarantee was "rigged" to provide Ritter with supplementary income. It failed not for want of effort but solely because the facts did not support its thesis. The court below found the appraisers to be honest and objective and the appraisal to have been made "in a reasonable and

objective manner" designed to elicit fair market value (Pet., pp. 13a-16a, 30a, 36a).[3] On the settled record, therefore, the Government cannot now argue that the appraisal was inflated above fair market value and thus cannot establish a parallel to the *LoBue* transfer of property at other than its true worth.

The Government's claim on the house loss reimbursement is without merit even if it were not untimely. Absent other evidence, it may be just to "presume" (Mem., p. 9) that fair market value is proved by the price one had to settle for. But here such a presumption is rebutted both by the evidence of independent appraisers and by the settled fact that the sale was not between "willing" parties but by a transferred employee under a business compulsion to dispose of his house. Certainly no one familiar with real estate would contend that a piece of expensive residential property can be dropped on the market at will with the sure expectation of a fair return. Contrary to the Government's simplistic argument, petitioner's sale was indeed "forced" in the most realistic sense. After six months of fruitless efforts to sell, anyone not compelled to transfer by his employer and not protected by a promise of loss reimbursement might well have awaited a better offer or taken the house off the market. This option was not open to Ritter because

[3] The final appraisal figure was within eleven hundred dollars of the petitioner's cost on his residence, purchased only a year and a half before its sale (Pet., p. 37a), and could reasonably have been higher since petitioner "contributed substantially" himself to the completion of the house (Pet., p. 37a) over and above this cost. Were the price realized accepted as the measure of fair value, petitioner's property would have *declined* almost four thousand dollars below cost during this short period despite the substantial contribution of petitioner and the established trend of increasing values in real estate.

he was required to move to Southern California solely for the convenience of his employer.

To summarize, the Government by its silence virtually concedes that the present case squarely presents a question of continuing importance to hundreds of thousands of middle-income taxpayers on which there is a conflict in the lower courts. In addition, the question is one on which Congress has declined to legislate pending an authoritative interpretation by the courts. These circumstances would warrant certiorari by accepted standards even if the Government appeared to have a strong case to make upon plenary review. It is clear, however, that in taxing reimbursements of the kind involved here the Service has seriously diverged from the compensation test of gross income enunciated by this Court and has adopted an arbitrary formula as a matter of administrative fiat. Accordingly, the merits provide no refuge for the Government but on the contrary furnish a supplementary reason for review by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 308

# Supreme Court of the United States

OCTOBER TERM, 1968

JAMES J. RITTER, *Petitioner*,

*v.*

THE UNITED STATES, *Respondent*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## PETITIONER'S SUPPLEMENTAL MEMORANDUM

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# Supreme Court of the United States

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## PETITIONER'S SUPPLEMENTAL MEMORANDUM

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Since the filing of Petitioner's Reply Brief two courts of appeals have rendered virtually conflicting opinions that underscore the need for a decision by this Court resolving the income tax consequences of expense reimbursements. *United States* v. *Gotcher,* 68-2 U.S. Tax Cas. para. 9546 (5th Cir., Aug. 27, 1968); *Commissioner* v. *Starr,* No. 9370 (10th Cir., Aug. 30, 1968). Copies of both opinions are reprinted in the appendix to this Memorandum.

In *Starr*, the Tenth Circuit reversed the Tax Court and held that reimbursements to a transferred employee for related temporary living expenses incurred solely for the convenience of his employer constituted income and were not deductible. The court, after holding the case under advisement for more than a year, ignored the Tax Court's reasoned conclusion that the reimbursements were non-compensatory, and held that whatever their purpose or effect, they were as a matter of law income and non-deductible.

By contrast, in *Gotcher* a foreign car manufacturer paid the expenses of the taxpayer—a prospective auto dealer—and his wife on a trip to Germany to examine the manufacturer's facilities. The Fifth Circuit rejected the matter-of-law approach followed in the *Starr* case and by the Court of Claims in the instant case and inquired whether the expense payments were actually income, that is, whether they conferred economic gain primarily to benefit the dealer. It looked to "the primary purpose of the expenses," stating "that the first consideration is the intention of the payor." In concluding that the payments on behalf of the dealer for his expenses "served a legitimate corporate purpose" and did not constitute income to him, the court emphasized that while the dealer "was not forced to go, there is no doubt that in the reality of the business world he had no real choice." Pp. 7a, 9a, *infra*. These same principles persuaded the court that the wife's trip was primarily a vacation and, accordingly, that portion of the payments constituted income.

These two decisions, pointing in opposite directions, confirm the need for Supreme Court review of the present case. The principles of *Gotcher* would surely

exclude from income expense reimbursements, such as those in the present case, the "primary purpose" of which was to serve the employer's "legitimate corporate purpose" by financing a job transfer as to which the employee "had no real choice." The *Starr* decision not only clashes with this conclusion, but it accentuates the existing conflict between several circuits and the Tax Court and the resulting dilemma facing petitioner and hundreds of thousands of other transferred employees.

Respectfully submitted,

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September 1968

## APPENDIX

UNITED STATES OF AMERICA, *Appellant*

v.

JOHN WILLIAM GOTCHER, ET UX., *Appellees.*

U. S. Court of Appeals, 5th Circuit, No. 24472, 8/27/68. Affirming in part and reversing in part District Court decision, (DC) 66-2 USTC ¶ 9634, 259 F. Supp. 340.

Mitchell Rogovin, Assistant Attorney General, Richard C. Pugh, Acting Assistant Attorney General, Lee A. Jackson, Gilbert E. Andrews, Jonathan S. Cohen, Stuart A. Smith, Department of Justice, Washington, D. C. 20530, W. Wayne Justice, United States Attorney, Tyler, Tex., for appellant. J. Robert Dobbs, Jr., Allen E. Pye, 433 Citizens First Nat'l Bk. Bldg., Tyler, Tex., for appellees.

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: In 1960, Mr. and Mrs. Gotcher took a twelve-day expense-paid trip to Germany to tour the Volkswagen facilities there. The trip cost $1372.30. His employer, Economy Motors, paid $348.73, and Volkswagen of Germany and Volkswagen of America shared the remaining $1023.53. Upon returning, Mr. Gotcher bought a twenty-five percent interest in Economy Motors, the Sherman, Texas Volkswagen dealership, that had been offered to him before he left. Today he is President of Economy Motors in Sherman and owns fifty percent of the dealership. Mr. and Mrs. Gotcher did not include any part of the $1372.30 in their 1960 income. The Commissioner determined that the taxpayers had realized income to the extent of the $1372.30 for the expense-paid trip and asserted a tax deficiency of $356.79, plus interest. Taxpayers paid the deficiency, plus $82.29 in interest, and

thereafter timely filed suit for a refund. The district court, sitting without a jury, held that the cost of the trip was not income or, in the alternative, was income and deductible as an ordinary and necessary business expense. [66-2 USTC ¶ 9634] 259 F. Supp. 340. We affirm the district court's determination that the cost of the trip was not income to Mr. Gotcher ($686.15); however, Mrs. Gotcher's expenses ($686.15) constituted income and were not deductible.

Section 61 of the Internal Revenue Code of 1954 [hereinafter referred to by section number only] defines gross income as income from whatever source derived and specifically includes fifteen items within this definition. The court below reasoned that the cost of the trip to the Gotchers was not income because an economic or financial benefit does not constitute income under section 61 unless it is conferred as compensation for services rendered. This conception of gross income is too restrictive since it is well-settled that section 61 should be broadly interpreted and that many items, including noncompensatory gains, constitute gross income.[1]

Sections 101-23 specifically exclude certain items from gross income. Appellant argues that the cost of the trip should be included in income since it is not specifically excluded by sections 101-23, reasoning that section 61 was drafted broadly to subject all economic gains to tax and any exclusion should be narrowly limited to the specific

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[1] *See Rudolph v. United States*, 1962, [62-2 USTC ¶ 9543] 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484; *James v. United States*, 1961, [61-1 USTC ¶ 9449] 366 U. S. 213, 81 S. Ct. 1052, 6 L. Ed. 2d 246 (embezzled funds); *Commissioner v. Glenshaw Glass Co.*, 1955, [55-1 USTC ¶ 9308] 348 U. S. 426, 75 S. Ct. 473, 99 L. Ed. 483 (exemplary damages); *William A. Brown*, 1967, [CCH Dec. 28,311] 47 T. C. 399 (strike benefits); J. Sneed, *The Configurations of Gross Income* 63 (1967).

exclusions.[2] This analysis is too restrictive since it has been generally held that exclusions from gross income are not limited to the enumerated exclusions.[3] Moreover, the Supreme Court in *Rudolph v. United States,* 1962, [62-2 USTC ¶ 9543] 370 U.S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484, has indicated, in concurring and dissenting opinions to dismissing the writ of certiorari as improvidently granted, that sections 101-23 are not exhaustive. See also, *Disney v. United States,* C. D. Calif. 1967, [67-1 USTC ¶ 9428] 267 F. Supp. 1; *John L. Ashby and Cornelia G. Ashby,* 1968, [CCH Dec. 28,981] 50 T. C. No. 38 (May 29, 1968); *J. Simpson Dean,* 1963, [CCH Dec. 24,742] 35 T. C. 1083.

In determining whether the expense-paid trip was income within section 61, we must look to the tests that have been developed under this section. The concept of economic

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[2] *See Commissioner v. Glenshaw Glass Co.,* 1955, [55-1 USTC ¶ 9308] 348 U. S. 426, 75 S. Ct. 473, 99 L. Ed. 483; *Smith v. Commissioner,* 6th Cir. 1966, [67-1 USTC ¶ 9109] 370 F. 2d 178; *Buder v. United States,* 8th Cir. 1966, [66-1 USTC ¶ 9155] 354 F. 2d 941; *United States v. James,* 9th Cir. 1964, [64-2 USTC ¶ 9576] 333 F. 2d 748; *Heard v. United Statse,* 8th Cir. 1964, [64-1 USTC ¶ 9227] 326 F. 2d 962; *United Grocers, Ltd. v. United States,* 9th Cir. 1962, [62-2 USTC ¶ 9763] 308 F. 2d 634.

[3] Under the 1939 Code a similar statutory scheme existed—a broad definition of gross income with certain specific exclusions. Int. Rev. Code of 1939, § 22. Under the 1939 Code, however, meals and lodging furnished for the convenience of the employer were not specifically excluded, as they are under the 1954 Code. *See* Int. Rev. Code of 1954, § 119. Nevertheless, the Treasury, as well as the courts, held that meals and lodging furnished for the convenience of the employer were not included within the gross income of the employee. *See Diamond v. Sturr,* 2d Cir. 1955, [55-1 USTC ¶ 9323] 221 F. 2d 264; *Saunders v. Commissioner,* 3d Cir. 1954, [54-2 USTC ¶ 9589] 215 F. 2d 768; Treas. Reg. 111, § 29.22(a)-3. *See generally* H. Simons, *Personal Income Taxation* 53 (1938); J. Sneed, *The Configurations of Gross Income* 82, 85 (1967); Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis,* 18 Stan. L. Rev. 1099, 1102 (1966).

gain to the taxpayer is the key to section 61. H. Simons, *Personal Income Taxation* 51 (1938); J. Sneed, *The Configurations of Gross Income* 8 (1967). This concept contains two distinct requirements: There must be an economic gain, and this gain must primarily benefit the taxpayer personally. In some cases, as in the case of an expense-paid trip, there is no direct economic gain, but there is an indirect economic gain inasmuch as a benefit has been received without a corresponding diminution in wealth. Yet even if expense-paid items, as meals and lodging, are received by the taxpayer, the value of these items will not be gross income, even though the employee receives some incidental benefit, if the meals and lodging are primarily for the convenience of the employer. *See* Int. Rev. Code of 1954, § 119.

In two cases, *Rudolph v. United States,* 5th Cir. 1961, [61-2 USTC ¶ 9539] 291 F. 2d 841, and *Patterson v. Thomas,* 5th Cir. 1961, [61-1 USTC ¶ 9310] 289 F. 2d 108, this Court has examined expense-paid trips and held that the value of these trips constituted income. Both of these cases involved conventions for insurance salesmen, and in both it was evident that the trip was awarded as compensation for past services. The instant case differs from *Rudolph* and *Patterson* in that there is no evidence in the record to indicate that the trip was an award for past services since Mr. Gotcher was not an employee of VW of Germany and he did nothing to earn that part of the trip paid by Economy Motors.

The trip was made in 1959 when VW was attempting to expand its local dealerships in the United States. The "Buy American" campaign and the fact that the VW people felt they had a "very ugly product" prompted them to offer these tours of Germany to prospective dealers. The VW story was related by Mr. Horton, who is Manager of Special Events for VW of America. His testimony was uncontradicted and unimpeached. He stated that VW oper-

ations were at first so speculative that cars had to be consigned with a repurchase guarantee. In 1959, when VW began to push for its share of the American market, its officials determined that the best way to remove the apprehension about this foreign product was to take the dealer to Germany and have him see his investment first-hand. It was believed that once the dealer saw the manufacturing facilities and the stability of the "new Germany" he would be convinced that VW was for him.[4] Furthermore, VW considered the expenditure justified because the dealer was being asked to make a substantial investment of his time and money in a comparatively new product. Indeed, after taking the trip, VW required him to acquire first-class facilities. It was hoped that this would be accomplished by following the international architectural plans that VW had for its dealerships. It was also hoped that the dealer would adopt VW's international plan for the sales and services department. Mr. Horton testified that VW could not have asked that this upgrading be done unless it convinced the dealer that VW was here to stay. Apparently these trips have paid off since VW's sales have skyrocketed and the dealers have made their facilities top-rate operations under the VW requirements for a standard dealership.

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[4] The district court provided a good summary:

From the standpoint of VW, VWOA and Inter-Continental, the purpose of such dealer tours to Germany was to strengthen the Volkswagen family business ties, to supply first-hand information about Volkswagen and the organization behind it, to educate the dealers as to the merits of the product they sell, to acquaint the dealers with the manufacturing processes responsible for Volkswagen's excellent performance reputation, and to acquaint the dealers with the conditions existing in West Germany in order that the dealers would themselves become convinced of the stability of the Volkswagen organization and the stability of the economy of West Germany to the end that the dealers could go back to their respective buyers of Volkswagen vehicles that the organization behind the Volkswagen was a substantial one and that the Volkswagen was here to stay. 259 F. Supp. at 342.

The activities in Germany support the conclusion that the trip was oriented to business. The Government makes much of the fact that the travel brochure allocated only two of the twelve days to the touring of VW factories. This argument ignores the uncontradicted fact that not all of the planned activities were in the brochure. There is ample support for the trial judge's finding that a substantial amount of time was spent touring VW facilities and visiting local dealerships. VW had set up these tours with local dealers so that the travelers could discuss how the facilities were operated in Germany. Mr. Gotcher took full advantage of this opportunity and even used some of his "free time" to visit various local dealerships. Moreover, at almost all of the evening meals VW officials gave talks about the organization and passed out literature and brochures on the VW story.

Some of the days were not related to touring VW facilities, but that fact alone cannot be decisive. The dominant purpose of the trip is the critical inquiry and some pleasurable features will not negate the finding of an overall business purpose. *See Patterson v. Thomas, supra.* Since we are convinced that the agenda related primarily to business and that Mr. Gotcher's attendance was prompted by business considerations, the so-called sightseeing complained of by the Government is inconsequential. *See Peoples Life Insurance Co. v. United States,* U. S. Ct. Cl. 1967 [67-1 USTC ¶ 9301] 373 F. 2d 924, 930. Indeed, the district court found that even this touring of the countryside had an indirect relation to business since the tours were not typical sightseeing excursions but were connected to the desire of VW that the dealers be persuaded that the German economy was stable enough to justify investment in a German product. We cannot say that this conclusion is clearly erroneous. Nor can we say that the enthusiastic literary style of the brochures negates a dominant business purpose. It is the business reality of the total situation, not the colorful expressions in the literature, that controls. Con-

sidering the record, the circumstances prompting the trip, and the objective achieved, we conclude that the primary purpose of the trip was to induce Mr. Gotcher to take out a VW dealership interest.

The question, therefore, is what tax consequences should follow from an expense-paid trip that primarily benefits the party paying for the trip. In several analogous situations the value of items received by employees has been excluded from gross income when these items were primarily for the benefit of the employer. Section 119 excludes from gross income of an employee the value of meals and lodging furnished to him for the convenience of the employer. Even before these items were excluded by the 1954 Code, the Treasury and the courts recognized that they should be excluded from gross income.[5] Thus it appears that the value of any trip that is paid by the employer or by a businessman primarily for his own benefit should be excluded from gross income of the payee on similar reasoning. *See Disney v. United States,* C. D. Calif. 1967, [67-1 USTC ¶ 9428] 267 F. Supp. 1; *Commissioner v. Riss,* 1967, [CCH Dec. 28,716(M)] 26 T. C. M. 1334.

In the recent case of *Allen J. McDonnell* [CCH Dec. 28,329(M)], 26 T. C. M. 115, Tax Ct. Mem. 1967-18, a sales supervisor and his wife were chosen by lot to accompany a group of contest winners on an expense-paid trip to Hawaii. In holding that the taxpayer had received no income, the Tax Court noted that he was required by his employer to go and that he was serving a legitimate business purpose though he enjoyed the trip. The decision suggests that in analyzing the tax consequences of an expense-paid trip one important factor is whether the traveler had any choice but to go. Here, although taxpayer was not forced to go, there is no doubt that in the reality of the business world he had no real choice. The trial judge reached the same conclusion. He

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[5] *See* note 3 *supra.*

found that the invitation did not specifically order the dealers to go, but that as a practical matter it was an order or directive that if a person was going to be a VW dealer, sound business judgment necessitated his accepting the offer of corporate hospitality. So far as Economy Motors was concerned, Mr. Gotcher knew that if he was going to be a part-owner of the dealership, he had better do all that was required to foster good business relations with VW. Besides having no choice but to go, he had no control over the schedule or the money spent. VW did all the planning. In cases involving noncompensatory economic gains, courts have emphasized that the taxpayer still had complete dominion and control over the money to use it as he wished to satisfy personal desires or needs. Indeed, the Supreme Court has defined income as accessions of wealth over which the taxpayer has complete control. *Commissioner v. Glenshaw Glass Co., supra.* Clearly, the lack of control works in taxpayer's favor here.

*McDonnell* also suggests that one does not realize taxable income when he is serving a legitimate business purpose of the party paying the expenses. The cases involving corporate officials who have traveled or entertained clients at the company's expense are apposite. Indeed, corporate executives have been furnished yachts, *Challenge Mfg. Co. v. Commissioner,* 1962, [CCH Dec. 25,304] 37 T. C. 650, taken safaris as part of an advertising scheme, *Sanitary Farms Dairy, Inc.,* 1955, [CCH Dec. 21,376] 25 T. C. 463, and investigated business ventures abroad, but have been held accountable for expenses paid only when the court was persuaded that the expenditure was primarily for the officer's personal pleasure.[6] On the other hand, when it has been shown that the expenses were paid to effectuate a legitimate corporate end and not to benefit the officer

[6] *Walker v. Commissioner,* 7th Cir. 1966, [66-1 USTC ¶ 9426] 362 F. 2d 140; *Gale v. Commissioner,* 6th Cir. 1961, [62-1 USTC ¶ 9168] 297 F. 2d 270; *American Properties, Inc. v. Commissioner,* 9th Cir. 1958, [59-1 USTC ¶ 9130] 262 F. 2d 150.

personally, the officer has not been taxed though he enjoyed and benefited from the activity.[7] Thus, the rule is that the economic benefit will be taxable to the recipient only when the payment of expenses serves no legitimate corporate purpose. *See Commissioner v. Riss,* 8th Cir. 1967, [67-1 USTC ¶ 9292] 374 F. 2d 161. The decisions also indicate that the tax consequences are to be determined by looking to the primary purpose of the expenses and that the first consideration is the intention of the payor. The Government in argument before the district court agreed that whether the expenses were income to taxpayers is mainly a question of the motives of the people giving the trip. Since this is a matter of proof, the resolution of the tax question really depends on whether Gotcher showed that his presence served a legitimate corporate purpose and that no appreciable amount of time was spent for his personal benefit and enjoyment. *See United Aniline Co.,* 1962, [CCH Dec. 25,409(M)] 21 T. C. M. 327.

Examination of the record convinces us that the personal benefit to Gotcher was clearly subordinate to the concrete benefits to VW. The purpose of the trip was to push VW in America and to get the dealers to invest more money and time in their dealerships. Thus, although Gotcher got some ideas that helped him become a better dealer, there is no evidence that this was the primary purpose of the trip. Put another way, this trip was not given as a pleasurable excursion through Germany or as a means of teaching taxpayer the skills of selling. He had been selling cars since 1949. The personal benefits and pleasure were

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[7] *United Aniline Co. v. Commissioner,* 1st Cir. 1968, [63-1 USTC ¶ 9434] 316 F. 2d 701, 705; *John L. Ashby and Cornelia G. Ashby,* 1968, [CCH Dec. 28,981] 50 T. C. No. 38 (May 29, 1968); *Commissioner v. Riss,* 1967, [CCH Dec. 28,716(M)] 26 T. C. M. 1334; *Manu-Mine Research and Development Co.,* 1967, [CCH Dec. 28,692(M)] 26 T. C. M. 1259, 1278; *Bardahl Mfg. Co.,* 1960, [CCH Dec. 24,410(M)] 19 T. C. M. 1245.

incidental to the dominant purpose of improving VW's position on the American market and getting people to invest money.

The corporate-executive decisions indicate that some economic gains, though not specifically excluded from section 61, may nevertheless escape taxation. They may be excluded even though the entertainment and travel unquestionably give enjoyment to the taxpayer and produce indirect economic gains. When this indirect economic gain is subordinated to an overall business purpose, the recipient is not taxed. We are convinced that the personal benefit to Mr. Gotcher from the trip was merely incidental to VW's sales campaign.

As for Mrs. Gotcher, the trip was primarily a vacation. She did not make the tours with her husband to see the local dealers or attend discussions about the VW organization. This being so the primary benefit of the expense-paid trip for the wife went to Mr. Gotcher in that he was relieved of her expenses. He should therefore be taxed on the expenses attributable to his wife. *See Disney v. United States, supra.* Nor are the expenses deductible since the wife's presence served no bona fide business purpose for her husband. Only when the wife's presence is necessary to the conduct of the husband's business are her expenses deductible under section 162. *Acacia Mutual Life Insurance Co. v. United States,* D. Md. 1967, [67-2 USTC ¶ 9608] 272 F. Supp. 188, 201. Also, it must be shown that the wife made the trip only to assist her husband in his business. A single trip by a wife with her husband to Europe has been specifically rejected as not being the exceptional type of case justifying a deduction. *Warwick v. United States,* E. D. Va. 1964, [64-2 USTC ¶ 9864] 236 F. Supp. 761; *See also Silverman v. Commissioner,* 8th Cir. 1958 [58-1 USTC ¶ 9433] 253 F. 2d 849.

AFFIRMED in part; REVERSED in part.

**Concurring Opinion**

BROWN, Chief Judge, concurring: I concur in the result and in the opinion. I would only add that on the reasoning here set forth the husband-bread-winner-taxpayer in both *Thomas* and *Rudolph* would have prevailed because it was to the self-expressed self-interest of the two insurance company employers that the agent-employees had to travel to, and be in attendance at, the company planned, paid for, controlled and directed trip.

Attributing income to the little wife who was neither an employee, a prospective employee, nor a dealer, for the value of a trip she neither planned nor chose still bothers me. If her uncle had paid for the trip, would it not have been a pure gift, not income? Or had her husband out of pure separate property given her the trip would the amount over and above the cost of Texas bed and board have been income? I acquiesce now, confident that for others in future cases on a full record the wife, as now does the husband, also will overcome.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM 1968

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No. 9370

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

v.

HOMER H. AND MINNIDELL M. STARR, *Respondents.*

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**On Petition for Review of the Decision of the Tax Court of the United States**

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Edward Lee Rogers, Attorney, Dept. of Justice, Washington, D.C. (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, Dept. of Justice, Washington, D.C. with him on brief) for the Petitioner.

Homer H. Starr, pro se.

John N. Stull, Denver, Colorado, as amicus curiae.

Before MURRAH, Chief Judge, WILBUR K. MILLER* and HICKEY, Circuit Judges.

HICKEY, Circuit Judge.

This is an action to recover federal income taxes paid on money received by an employee from his employer to reimburse him for temporary living expenses when he was transferred to a new post of duty. Taxpayer questions the

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* Senior Circuit Judge of the United States Court of Appeals for the District of Columbia, sitting by designation.

inclusion of this money in his taxable gross income and, in the alternative, contends these reimbursements are deductible as moving expenses.

Taxpayer, appellee, has been employed by the United States Steel Corporation since 1937. On December 1, 1961, the taxpayer was permanently transferred, at a reduced salary, from San Francisco, California, to Lander, Wyoming. The taxpayer arrived in Lander on December 4, 1961, but was unable to buy a home until December 20, 1961. Occupancy was promised January 20, 1962 and actually effected on January 29, 1962. From December 4th until his family arrived from San Francisco taxpayer lived at a Lander hotel.

The company reimbursed taxpayer for his living expenses in Lander during this period but he did not report these reimbursements as income. The Commissioner of Internal Revenue audited the taxpayer's return and determined the reimbursements should have been reported as income. The taxpayer paid the resultant additional tax and instituted this action, pro se, to recover the additional taxes plus interest. The tax court held the reimbursements should not have been included in gross income and awarded taxpayer a judgment. The Commissioner perfected this appeal and United States Steel Corporation's tax counsel was permitted to file a brief as amicus curiae. Taxpayer relies upon John E. Cavanagh, 36 T.C. 300 (1961), which held similar living expenses deductible and the reimbursements for extraordinary food and lodging expenses not includable in gross income.

The two questions presented, i.e. the includability of reimbursed travel expenses in gross income or the deductibility of these expenses as moving expenses, were both answered for this circuit by United States v. Woodall, 255 F.2d 370 (10th Cir. 1958). That case has not been overruled or modified and therefore controls the instant case.

The Tax Court in *Cavanagh* attempted to distinguish *Woodall*[1] but the difference is truly a distinction without a difference. The argument is advanced that the payments made in *Woodall* were like a cash bonus to a new employee or a part of the bargained for employment contract. It can just as validly be argued that the payments to the taxpayer were in the nature of a bargained for bonus as a part of his transfer to Lander. The pertinent language in *Woodall* can be paraphrased as follows:

> "The payment was in the nature of a cash bonus as an inducement to accept employment [transfer]. *As a matter of law,* these payments are no different than had Sandia [United States Steel] given the taxpayers cash to pay outstanding obligations, or for the payment of living expenses for a specified period after their [his] arrival in Albuquerque [Lander]." United States v. Woodall, 255 F.2d 370, 372 (10th Cir. 1958) (emphasis added).

*Woodall* disposes of the first question in the instant case, the includability in gross income, in the following words:

> "The law is settled that the statutory definition of gross income 'is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.'" *Id.* (citations omitted).

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[1] "We are also unable to conclude that an employee who has performed regular services for his employer for in excess of 5 weeks, as in the case here, is a 'new' employee as that term is used by the Court of Appeals for the Tenth Circuit in its disposition of an issue similar, but not the same as, the issue before us, United States v. Woodall, 255 F.2d 370 (1958). The facts in that case involve prospective employees who were transported to a prospective place of employment at their prospective employer's expense before beginning to render services." John E. Cavanagh, 36 T.C. 300, 303 (1961).

*Woodall* also controls the second argument advanced by the petitioner:

> "We think that it is equally well settled that the expenditures are not deductible expenses under Section 22(n) and Section 23(a) of the Internal Revenue Code of 1939, or Section 62(2) and Section 162 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 62(2), 162. Both taxpayers testified that the reasons which motivated them to accept employment with Sandia Corporation were personal. The expenditures had no relation to any service which was being performed for the employer." *Id.* at 373.

*Woodall* has not been overruled by this circuit or the Supreme Court, nor has it been superseded by any legislation of which we are aware. *Woodall* has been specifically followed on the questions presented here by Koons v. United States, 315 F.2d 542 (9th Cir. 1963). *Woodall* was cited and followed in Ritter v. United States, No. 394-64 (Ct. Cl. April 19, 1968).

By contrast *Cavanagh* was expressly overruled in England v. United States, 345 F.2d 414 (7th Cir. 1965) and was not followed in *Ritter*.

In view of this court's holding in *Woodall*, we reverse.

REVERSED.